SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, ET AL., PETITIONERS,

vs.

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pleas in the District Court of the United States, within and for the Eastern District of Illinois, at a Special Term thereof, begun and held in the United States Court Room, in the City of East St. Louis, in said District, before Honorable Fred L. Wham, Judge of said Court, on the First Monday of April, in the year of our Lord One Thousand Nine Hundred and Thirty Two, and of the Independence of the United States of America, the One Hundred and Fifty Sixth Year. Placita.

* * (Caption) * *

Be it remembered, that heretofore, to-wit: on the 13th day of November, A. D. 1931, came Ferrell and Hay, attorneys for Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, plaintiff herein, and filed in the office of the Clerk of said court in a cause entitled as above captioned, a Bill For Injunction and Other Relief, in Equity No. 4494, which said Bill of Complaint was and is in words and figures, the following, to-wit:

Nov. 13. 3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Illinois.

Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois,

Complainant,

vs.

City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casuaty Company of New York, a corporation,

Defendants.

BILL FOR INJUNCTION AND OTHER RELIEF.

To the Honorable Judge of the District Court of the United States for the Eastern District of Illinois, In Chancery Sitting:

Your orator, Ben Sneeden, as Receiver of The City National Bank of Herrin, respectfully represents unto the Court as follows:

1. That your orator is the duly appointed, qualified and acting receiver of The City National Bank of Herrin, a national banking association organized and existing under and by virtue of the Acts of Congress of the United States and located in the City of Herrin, County of Williamson and State of Illinois, by virtue of his appointment as such receiver heretofore on, to wit, October 22, 1931, made by the Comptroller of the Currency of the United States of America; that the City of Marion, Illinois, is a municipal corporation of the County of Williamson and State of Illinois; and that the Continental Illinois Bank and Trust Company, is a banking association organized and existing under and by virtue of the laws of the State of Illinois, and is located in the City of Chicago, County of Cook and State of Illinois and that the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illi-

nois, with an office in the City of Chicago, County of Cook and State of Illinois.

4 2. That your orator, as receiver of said The City National Bank of Herrin, is engaged in the winding up of the affairs of said bank under the direction of the Comptroller of the Currency of the United States and that this action is a suit for the winding up of the affairs of said bank.

3. That said bank failed to open for business on the business day of October 21, 1931, and has remained closed and suspended ever since; that prior to the suspension of said bank said bank owned and held the following described bonds and securities:

$2000 Par Value National Steel Company 5% 1956 First Mortgage Sinking Fund;

$2000 Par Value Puget Sound Power and Light 4½% of 1950 First Refunding;

$3000 Par Value Commonwealth Edison Company 3½% 1932;

$2000 Par Value Laclede Gas Light Company 5% of 1934;

$1000 Gary Electric and Gas Company 5% of 1934;

$1000 Texas Corporation 5% 1934;

$2000 Par Value City of Chicago 4% of 1933 Street Lighting;

$2000 Par Value City of Detroit Refunding 4½% 1932;

$2000 State of Illinois Highway 4% of 1942;

$4000 United States Treasury 3⅛% of 1949.

4. That the City of Marion, Illinois, is a municipal corporation organized and existing under the laws of the State of Illinois; that subsequent to, to wit, the 25th day of August, 1931, and prior to, to wit, October 21, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank above mentioned funds of said City of Marion, Illinois, by the name and style of Ray C. Carroll, City Treasurer and on, to wit, October 21, 1931, the date of the closing of said bank, said Ray C. Carroll, as City Treasurer of the City of Marion, Illinois, had on deposit in said The City National Bank the sum of $16,430.00.

5 5. That Section 5153 of the Revised Statutes of the United States, among other things, provides with reference to deposit of moneys in national banks, as follows:

"Any association may, upon deposit with it of public money of a state or any political subdivision thereof, give security for the safe keeping and prompt payment of the money so

deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

That the City of Marion, Illinois, one of the defendants herein, has adopted what is commonly known as the "Commission Form of Government" as provided by an Act of the General Assembly of the State of Illinois entitled "An Act to Amend an Act entitled 'An Act to Provide for the incorporation of cities and villages' approved April 10, 1872, in force July 1, 1872, and all Acts amendatory thereto by adding thereto Article 13" and is now and for more than one year last past has been operating under and pursuant to said act. Section 51 of said act above mentioned (Cahill's Illinois Revised Statutes 1931 page 412) provides as follows:

"In addition to the other duties now imposed by law upon the treasurer of any city or village, the said treasurer shall make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever to his credit as treasurer of said city or village, in one or more banks situated in said city or village, to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city or village, or by any two of them, and any such bank, before any such deposit is made therein, shall be required to enter into an obligation with the said council to pay into the treasury of such city or village interest on the monthly balances of such deposits at a rate to be fixed by the president of said council, the commissioner of accounts and finance, and the treasurer, or by any two of them, and which rate may be changed in the same manner—such rate to be not less than three (3) per centum per annum, and shall also execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depository bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank. All interest paid by any such bank upon such balances shall be collected by the treasurer of said city or village, and shall be by him reported in his next statement following such collection, and shall be considered and treated as a part of the general fund of such city or village, subject to use for any legitimate municipal purpose.

6. That in an effort to and for the purpose of securing the deposits of said Ray Carroll, as treasurer of said city of Marion, Illinois, in said The City National Bank, said City National Bank on, to wit, August 28, 1931 deposited with said Continental Illinois Bank and Trust Company, one of the defendants herein, the bonds and securities of said City National Bank of Herrin, Illinois, above mentioned, said deposit being made pursuant to a certain purported
6 trust deposit or articles of agreement between said The City National Bank of Herrin, Illinois, and said Continental Illinois Bank and Trust Company, a true and correct copy of which said trust deposit or articles of agreement is hereto attached marked "Exhibit A" and made a part hereof by attachment and reference. That said bonds and securities above mentioned were on, to wit, August 28, 1931 and are now owned by said bank and that your orator, as receiver of such bank is in custody of all the assets and property thereof and is entitled to the possession of said bonds and securities above mentioned; that said bonds and securities above mentioned are now held by said Continental Illinois Bank and Trust Company, one of the defendants herein, under and pursuant to said purported trust deposit or articles of agreement hereto attached and marked "Exhibit A" and heretofore referred to.

7. That the deposit by said City National Bank of the aforementioned bonds and securities with said Continental Illinois Bank and Trust Company above mentioned was illegal and void and of no force and effect in that said City National Bank was only authorized under and pursuant to the laws of the United States to give security for the safe keeping and prompt payment of the said moneys of the City of Marion, Illinois, of the same kind as is authorized by the law of the State of Illinois in the case of other banking institutions in said State of Illinois; that said City National Bank of Herrin, Illinois, was not at the time of said deposits, or any of them, nor is it now located in said City of Marion, Illinois, and that said City National Bank of Herrin, Illinois did not, before any of the said deposits were made, enter into an obligation with said council of said City of Marion, Illinois, to pay to the treasurer of said City of Marion interest on the monthly balance of such deposits at a rate fixed by the president of said council, the commissioner of accounts and finance of said city and the treasurer of said city, or by any two of them, at not less than three per cent

per annum and said City National Bank did not execute a good and sufficient bond with sureties approved by the president of said council conditioned that said City National Bank of Herrin would safely keep and account for and pay over
7 said moneys; that said City National Bank of Herrin, Illinois, did not enter into any bond whatsoever with said City of Marion, Illinois, or any of the officials of said city of Marion, Illinois, conditioned as aforesaid but did purport and attempt to secure said deposit by depositing said bonds and securities of said bank with said Continental Illinois Bank and Trust Company as aforementioned; that no resolution of the Board of Directors of said City National Bank was ever adopted or passed by said Board authorizing or empowering the officers of said City National Bank to deliver or pledge said bonds and securities aforementioned, or any part thereof, as aforementioned; that the delivery of said bonds and securities was a fraud upon the general creditors and depositors of said City National Bank; that such delivery of said bonds and securities was wholly without the powers of said bank and the officers thereof and was an ultra vires act of said bank and of said officers and was and is wholly void and of no force and effect; that no title to or interest in or lien against said bonds and securities, or any part thereof, was acquired by any of the defendants herein by the aforesaid delivery thereof to said Continental Illinois Bank and Trust Company; that none of said defendants have any title to or interest in or lien against any of said bonds and securities but that your orator is entitled to the possession and custody thereof and that said moneys of said City of Marion, Illinois, deposited in said City National Bank as aforesaid, were not at the times of said deposits or at any other time the moneys of the United States.

8. That it is provided in and by said trust deposit or articles of agreement heretofore mentioned marked "Exhibit A," in substance, that if the moneys deposited by said City of Marion, Illinois in said City National Bank as aforementioned are not paid upon demand that in each and every such event said Continental Illinois Bank and Trust Company is given full and irrevocable power and authority to sell the said securities or any part thereof without advertising and without further demand and without giving notice to said City National Bank, or any one else, at any public or private sale or sales, or at any broker's board, and the
8 net proceeds thereof, after the payment of all costs, expenses and attorneys' fees of said Continental Illinois

Bank and Trust Company and its charges growing out of or connected with the said securities, and the care, safekeeping and delivery thereof, shall be applied to the payment of any and all said deposits with said City National Bank and to the payment of any and all liabilities and obligations whether due or not of said City National Bank to the said treasurer of the City of Marion, Illinois, and the surplus, if any, to be paid to said bank; that said bonds and securities are negotiable in character and are transferable by delivery merely and if sold cannot be traced by your orator; that said bonds and securities are of great value being of the value of more than $21,000.00 but that their present market value is depreciated and if sold now will not bring their real value and that if said bonds and securities are sold by said defendant herein, Continental Illinois Bank and Trust Company, they will bring far less than the real value thereof and the creditors and depositors of said City National Bank of Herrin will thereby suffer immediate and irreparable injury, loss and damage; that there are a great number of depositors and creditors of said City National Bank of Herrin, Illinois, having deposits herein of more than the sum of $300,000.00.

9. That your orator, as receiver of said City National Bank, has elected to and has disaffirmed and repudiated the alleged pledge of said bonds and securities as aforesaid and the purported agreement between said City National Bank and said Continental Illinois Bank and Trust Company and has so notified each of the defendants herein as is hereinafter stated.

10. That your orator, in an endeavor to prevent the sale of said bonds and securities aforesaid, did on the 11th day of November, 1931, send by United States mail, post paid, to each of the defendants herein, at their addresses as known to your orator, namely, City of Marion, Illinois, at Marion, Illinois, Continental Illinois Bank and Trust Company at Chicago, Illinois, and Fidelity and Casualty Company of New York at Chicago, Illinois, a written notification of his repudiation of said attempted pledge and said contract, a copy of which is hereto attached marked "Exhibit B" and made a part of this, your orator's bill of complaint by attachment and reference.

9 11. Your orator further represents that it appears in and from said "Exhibit A" heretofore mentioned that said defendant, the Fidelity and Casualty Company of New York, has some interest affected by this proceedings, either

as surety on the bond of said city treasurer to said City of Marion, Illinois, or otherwise, and that said Fidelity and Casualty Company of New York is therefore made a party defendant herein.

12. Your orator further represents that since said Continental Illinois Bank and Trust Company, defendant herein, is by said "Exhibit A" heretofore mentioned purported to be given the right by said City National Bank of Herrin, Illinois, to sell said aforementioned bonds and securities without notice of any kind whatsoever to said City National Bank and without advertising and that there is grave danger that said purported right may be attempted to be exercised by said Continental Illinois Bank and Trust Company unless restrained by the order of this Honorable Court and that if your orator should give said Continental Illinois Bank and Trust Company notice of the filing of this bill of complaint and of the intended application for a temporary injunction by your orator that said defendant, Continental Illinois Bank and Trust company, may elect to exercise its purported rights under said "Exhibit A" as heretofore mentioned and that such sale would therefore be made before notice of this application could be served upon said Continental Illinois Bank and Trust Company or said other defendants herein, or either of them, and before a hearing can be had upon such application and that if such sale is made immediate and irreparable injury, loss and damage will be caused to your orator and the creditors of said City National Bank before such notice can be so served or such hearing had.

Forasmuch, Therefore, as your orator is without adequate remedy at law in the premises, your orator prays:

(1) That a subpoena may be issued out of this Honorable Court directed to the defendants, City of Marion, Illinois, of Marion, Illinois, Continental Illinois Bank and Trust Company of Chicago, Illinois, and the Fidelity and Casualty Company of New York of Chicago, Illinois, requiring and commanding them and each of them to appear in this cause upon a day certain and to answer the several allegations in this bill of complaint, but not under oath, the answer under oath being hereby expressly waived;

(2) That said delivery and alleged pledge of the said bonds and securities be adjudicated and decreed an illegal and ultra vires act on the part of said bank and the officers thereof, and that your orator be placed in possession thereof by the decree of this Court;

(3) That said defendants may be enjoined from disposing of said bonds and securities, or any part thereof, in any manner whatsoever;

(4) That a preliminary writ of injunction may issue immediately out of this Court directed to the Continental Illinois Bank and Trust Company, the City of Marion, Illinois and the Fidelity and Casualty Company of New York, commanding them to refrain from disposing of any of said bonds and securities and from causing the same to be disposed of in any manner whatsoever until the further order of this Court;

(5) That this Honorable Court may enter its temporary restraining order, ordering the defendants, City of Marion, Illinois, the Continental Illinois Bank and Trust Company and the Fidelity and Casualty Company of New York from disposing of any of said bonds and securities in any manner whatsoever until such time as the Court may designate; and

(6) That your orator may have such other and further relief in the premises as equity may require and to this Honorable Court shall seem meet.

And Your Orator Will Ever Pray.

Signed—BEN SNEEDEN
As Receiver of the City National Bank of Herrin, Illinois.

FERRELL AND HAY
Sgd—HOSEA V. FERRELL
Sgd—JOHN HAY
Solicitors for Complainant.

11 IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Illinois.

State of Illinois
County of Williamson } ss.

BEN SNEEDEN, being first duly sworn, upon his oath deposes and says that he, as receiver of The City National Bank of Herrin, Illinois, is the complainant in the foregoing bill of complaint; that he has carefully read said bill of complaint and is acquainted with the matters and the statements

therein contained; that the matters and things therein stated and alleged are true in substance and in fact.

And further affiant saith not.

Signed—BEN SNEEDEN

On this 12th day of November, 1931, came Ben Sneeden before me and, after first taking solemn oath before me, subscribed his name to the foregoing affidavit under such oath.

Signed—EDNA WELTON
Notary Public.

(Seal)

12 "EXHIBIT A."

Continental Illinois Bank and
Trust Company, TSDO No. 24181
231 South La Salle Street,
Chicago, Illinois.

Attention: Trust Department

Gentlemen:

We hereby deliver to you the $23,000.00 Par Value Securities, described in your receipt (s), Numbered:

102100/10

issued to us contemporaneously herewith, and which, together with any additional securities which we may hereafter deposit hereunder, we direct you to hold in escrow to secure any and all deposits heretofore made with us by Treasurer, City of Marion, Illinois of monies and funds belonging to said City or chargeable to him, or for which he is accountable as such Treasurer and any and all deposits of such funds and monies that he may hereafter make with us. And in the event that such monies and funds, or any part thereof, are not paid to said Treasurer upon demand, then in each and every such event we hereby give you full and irrevocable power and authority to sell the said securities, or any part thereof, without advertising and without further demand, and without giving notice to us or any one else; at any public or private sale or sales, or at any broker's board, and the net proceeds thereof, after the payment of all costs, expenses, and your attorneys' fees and your charges growing out of or connected with the said securities deposited as aforesaid with you, and the care, safekeeping and delivery thereof, shall be applied to the payment of any and all said deposits with us

and to the payment of any and all liabilities and obligations, whether due or not, of us, to the said Treasurer and the surplus if any shall be paid to us.

It is understood that we shall be entitled at any time and from time to time to make substitutions for any collateral at any time on deposit hereunder, upon delivery to you at the time of any proposed substitution, of a consent thereto in writing signed by said Treasurer, City of Marion and the Fidelity & Casualty Co. of New York. Any collateral so substituted shall be subject to all the terms and conditions herein provided with respect to the collateral originally deposited hereunder.

Prior to default on our part in complying with the demand for payment by said Treasurer as aforesaid we shall be entitled to receive the accruing interest on said securities, and you may either collect such interest for us or deliver to us the coupons representing, such interest as such coupons may from time to time mature. In all other respects the securities, prior to such default, shall be subject to the joint order of said Treasurer as aforesaid, The Fidelity & Casualty Company of New York the surety on his official bond, and ourselves.

Dated Aug 28 1931 1931.

CITY NATIONAL BANK, HERRIN, ILLINOIS
By R. A. KARR
Its Vice President.

(City National Bank Seal
Herrin, Illinois)

Attest:
By JOE P. BENSON
Its Cashier.

13 We acknowledge receipt of the securities above referred to, and agree to hold the same in accordance with the terms of the foregoing.

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY
By T. M. WAGSHAL
Assistant Secretary.

Dated Aug 28 1931 1931

(Executed in Quadruplicate)

14 "EXHIBIT B."

Herrin, Illinois

To City of Marion, Illinois, and

To Continental Illinois Bank and Trust Company, and

To Fidelity & Casualty Company of New York:

Referring to the deposit of the following described bonds and securities by The City National Bank of Herrin, Illinois, with the Continental Illinois Bank and Trust Company of Chicago, Illinois, pursuant to a purported agreement between said The City National Bank of Herrin, Illinois and the Continental Illinois Bank and Trust Company, of Chicago, Illinois, dated the 28th day of August, 1931, to wit: $2000.00 National Steel Company, 5% 1956 First Mortgage Sinking Fund; $2000.00 Pudget Sound Power & Light, 4½%, 1950 1st Ref; $3000.00 Commonwealth Edison Co. 3½% 1932; $2000.00 Laclede Gas Light Co. 5% 1934; $1000.00 Gary Elec. & Gas Co. 5% 1934; $1,000.00 Texas Corp. 5% 1934; $2000.00 City of Chicago 4% 1933 Street Lighting; $2,000.00 City of Detroit Refunding 4½% 1932; $2,000.00 State of Ill. Highway 4% 1942; $4,000.00 U. S. Treasury, 3⅛% 1949.

You Are Hereby Notified that said The City National Bank of Herrin, Illinois, is now closed and that I, Ben Sneeden, have been appointed receiver thereof by the Comptroller of the Currency of the United States of America on, to wit, October 22, 1931.

You Are Further Notified that I am advised that said The City National Bank of Herrin, Illinois, had no power or authority to deposit the aforementioned bonds and securities with said Continental Illinois Bank and Trust Company or to enter into the aforementioned purported agreement and that such purported deposit of said The City National Bank of Herrin, Illinois, and the entering into of said purported agreement was and is illegal and void, and

You Are Further Notified that as such receiver I have elected to and hereby do disaffirm and repudiate such deposit and said purported agreement by and between said The City National Bank of Herrin, Illinois, and said Continental Illinois Bank and Trust Company above mentioned and You and Each of You Are Hereby Notified to return the above mentioned bonds and securities to me, as such receiver, and demand for such return is hereby officially made by me, as such receiver, upon you and each of you and You and Each of

You Are Hereby Notified to take no steps in any respect whatsoever with reference to selling or disposing of any part or portion of the bonds and securities above mentioned.

Kindly Take Notice and Govern Yourselves and Each of You Accordingly.

Dated this the 11th day of November, A. D. 1931.

BEN SNEEDEN
As Receiver of the City National Bank of Herrin, Illinois.

15 Endorsed: * * (Caption) * * Bill for Injunction and Other Relief Filed Nov 13 1931 D. H. Reed, Clerk. Ferrell and Hay, Solicitors for Complainant.

16 And on the same day, to-wit: on the 13th day of November, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered N 1931.

17 * * (Caption) * *

ORDER OF COURT.

And now on this 13th day of November, A. D. 1931, it is ordered, adjudged and decreed by the Court that the City of Marion, Illinois, the Continental Illinois Bank and Trust Company of Chicago, Illinois, and the Fidelity and Casualty Company of New York of Chicago, Illinois, is hereby ordered to refrain from selling or in any way disposing of any of the following described bonds and securities:

$2000 Par value National Steel Company 5% 1956 First Mortgage Sinking Fund;
$2000 Par value Pudget Sound Power and Light 4½% of 1950 First Refunding;
$3000 Par value Commonwealth Edison Company 3½% 1932;
$2000 Par value Laclede Gas Light Company 5% of 1934;
$1000 Gary Electric and Gas Company 5% of 1934;
$1000 Texas Corporation 5% 1934;
$2000 Par value City of Chicago 4% of 1933 Street Lighting;
18 $2000 Par value City of Detroit Refunding 4½% 1932;
$2000 State of Illinois Highway 4% of 1942;
$4000 United States Treasury 3⅛% of 1949.

It appearing to the Court from the verified bill of complaint filed herein that immediate and irreparable injury, loss and damage will result to the complainant before a notice can be served on said City of Marion, Illinois, said Continental Illinois Bank and Trust Company and said Fidelity and Casualty Company of New York and a hearing had upon the application for a temporary writ of injunction and that such injury will occur by reason of an immediate sale of said bonds and securities which are the property of the complainant herein and which are in the custody of said Continental Illinois Bank and Trust Company; that said bonds are negotiable in character and cannot be readily traced upon transfers thereof; that by such impending sale and the manner of the same the full value of said bonds and securities will not be realized thereon and the value thereof as determined by said sale will be far less than the actual value thereof and that thereby said complainant will suffer immediate and irreparable injury and damage.

It Is Further Ordered that this order shall expire on the 23rd day of November, A. D. 1931, at 11:15 o'clock A. M.

Approved and Ordered Entered this 13th day of November, A. D. 1931, at the hour of 11:15 o'clock in the forenoon.

(Signed) FRED L. WHAM
Presiding Judge.

19 Endorsed: * * (Caption) * * Bill for Injunction and Other Relief Order of Court Filed Nov 13 1931 D. H. Reed, Clerk. Ferrell and Hay, Solicitors for Complainant.

Nov. 23. 20 And afterwards, to-wit: on the 23rd day of November, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

21 * * (Caption) * *

ORDER OF COURT.

And now on this 23rd day of November, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former restraining order and decree of this court entered in this cause on the 13th day of November, A. D. 1931 at the hour of 11:15 o'clock in the forenoon and expiring at the hour of

11:15 o'clock in the forenoon of November 23rd, 1931, ordering that the defendants in said cause refrain from in any manner disposing of the bonds and securities therein described, be and the same is hereby continued and extended in full force and effect until Thursday, the 3rd day of December, 1931, at the hour of 11 o'clock in the forenoon.

This order is entered by the Court for the reason that in the opinion of the Court the question involved is of considerable public interest and the Court desires that all parties shall be fully prepared to acquaint the Court with the authorities respecting the matters herein involved.

It is further ordered, adjudged and decreed by the Court that the hearing upon the matters of the issuance of a preliminary writ of injunction in this cause is continued to the 3rd day of December, 1931, at the hour of 11 o'clock in the forenoon at which time, such hearing is set.

22 This order is made returnable on the 3rd day of December, 1931, at 11 o'clock in the forenoon and shall expire at that time.

Approved and ordered entered at 11 o'clock in the forenon, November 23rd, 1931.

(Signed) FRED L, WHAM
U. S. District Judge.

23 Endorsed: * * (Caption) * * Order of Court Entered Filed Nov 23 1931 D. H. Reed, Clerk.

24 And afterwards, to-wit: on the 30th day of November, A. D. 1931, the following further proceedings were had in said court in said cause and entered of record, to-wit: Entered No 1931.

25 * * (Caption) * *

Monday, November 30th, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 30th day of November, A. D. 1931, upon due motion, and the Court being fully advised in the premises, It Is Ordered By the Court that the date to plead herein be, and the same is hereby extended to December 12th, A. D. 1931.

red Dec. 3, 31.

26 And afterwards, to-wit: on the 3rd day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit:

27 * * (Caption) * *

ORDER OF COURT.

And now on this 3d day of December, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former order and decree of this Court entered in this cause on November 13, 1931, and extended until December 3, 1931, by the order of this Court, entered herein on November 23, 1931, be and the same is hereby extended and continued in full force and effect until the 12th day of December, A. D. 1931, at 1:30 o'clock in the afternoon, upon the motion of the defendants.

The reasons for the entering of this order are that counsel for defendants, Pope and Driemeyer, show the Court that they have just recently been engaged as counsel in this cause and have not had sufficient time in which to prepare for the hearing upon the matter of the issuance of the preliminary writ of injunction in this cause; and that all parties hereto, by their respective counsel, stipulate and agree in open Court that said temporary restraining order be continued in full force and effect as hereinbefore ordered.

28

The hearing upon the matter of the issuance of the preliminary writ of injunction in this cause is hereby continued until, and is set for the 12th day of December, A. D. 1931.

This order shall expire, and is returnable at, the 12th day of December, A. D. 1931, at the hour of 1:30 o'clock in the afternoon.

Approved and Ordered Entered at the hour of 11 o'clock in the forenoon of December 3, A. D. 1931.

(Signed) FRED L. WHAM,
Presiding Judge.

29 Endorsed: * * (Caption) * * Order of Court. Filed Dec. 3, 1931. D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

30 And afterwards, to-wit: on the 11th day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered D 1931.

31 * * (Caption) * *

Friday, December 11th, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 11th day of December, A. D. 1931, upon due motion and the Court being fully advised in the premises, It Is Ordered by the Court, that defendants be and they are hereby given until December 22nd, A. D. 1931, in which to plead hereto.

32 And afterwards, to-wit: on the 12th day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered D 1931.

33 * * (Caption) * *

ORDER OF COURT.

And Now on this 12th day of December, A. D. 1931, upon the suggestion of the Court because of the pressure of other business it is ordered, adjudged and decreed by the Court that the former order and decree of this Court entered in this cause on November 13th, 1931, and extended until December 3rd, 1931, by the order of this Court, entered herein on November 23rd, 1931, and again extended until December 12th, 1931, by the order of this Court entered herein on December 3rd, 1931, be and the same is hereby extended and continued in full force and effect until the 22nd day of December, 1931, at 10 o'clock in the forenoon, all parties hereto agreeing thereto and their respective counsel stipulating and agreeing that said temporary restraining order be continued in full force and effect as hereinbefore ordered. The hearing upon the matter of the issuance of the preliminary writ of injunction is hereby continued until and is set for the 22nd day of December, 1931.

34 This order shall expire and is returnable on the 22nd day of December A. D. 1931, at the hour of 10 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10 o'clock in the forenoon of December 12th, 1931.

(Signed) FRED L. WHAM,
Presiding Judge.

35 Endorsed: * * (Caption) * * Order of Court. Entered December 12, 1931. D. H. Reed, Clerk. Pope & Driemeyer, Attorneys and Counselors at Law, 24 North Main Street, East St. Louis, Illinois.

ec. 21, 36 And afterwards, to-wit: on the 21st day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Motion to Dismiss on behalf of Defendant Continental Illinois Bank and Trust Company, a Corporation, which said Motion to Dismiss was and is in words and figures the following, to-wit:

37 * * (Caption) * *

MOTION OF CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION, ONE OF THE DEFENDANTS HEREIN, TO DISMISS THE BILL OF COMPLAINT.

(This motion withdrawn by leave of court 12/22/31)

D. H. REED,
Clerk.

Now comes Continental Illinois Bank and Trust Company, one of the defendants in the above cause, and moves the court to dismiss the bill of complaint herein because it says:

1. That it appears on the face of said bill of complaint that the same is wholly without equity.
2. The facts pleaded in said bill of complaint are insufficient to constitute a valid cause of action in equity.
3. That it appears on the face of the bill of complaint that Ray C. Carroll is a necessary and indispensable party to this cause, and that the plaintiff has failed to join him as a party defendant hereto.

Wherefore, this defendant prays that the said bill of complaint may be dismissed.

(Signed) MAYER, MEYER, AUSTRIAN & PLATT,
Solicitors for said defendant, Continental Illinois Bank and Trust Company.

(Signed) CARL MEYER
(Signed) DAVID F. ROSENTHAL
(Signed) RICHARD MAYER
Of Counsel.
H. F. DRIEMEYER

Endorsement: In Equity No. 4495 District Court of the United States, Eastern District of Illinois Ben Sneeden, etc. vs. City of Marion, Illinois, etc. Motion to Dismiss. Filed Dec 21 1931 D. H. Reed, Clerk. Mayer, Meyer, Austrian & Platt 231 South LaSalle Street Chicago Telephone State 0600.

67 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Amendment to Bill of Complaint, by leave of court, which said Amendment to Bill of Complaint, was and is in words and figures the following, to-wit: Filed Dec. 1931.

68 • • (Caption) • •

AMENDMENT TO BILL OF COMPLAINT.

Filed Dec. 22, 1931. D. H. Reed, Clerk.

The complainant, Ben Sneeden, as Receiver of The City National Bank of Herrin, of Herrin, Illinois, pursuant to leave of this Court heretofore granted on the 22d day of December, A. D. 1931, comes and amends his bill of complaint in the above entitled cause as follows:

1. By inserting immediately after the words "and the Fidelity and Casualty Company of New York, a corporation" contained in the style of said cause in said bill of complaint, the name "Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

69 2. By inserting immediately following line 17 of page 2 of said bill of complaint, the following: "and that Ray

C. Carroll is the duly appointed, qualified and acting Treasurer of the City of Marion, Illinois".

3. By inserting in the 17th line of page 12 of said bill of complaint immediately after the word "Illinois" and immediately before the word "required", the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

4. By inserting in line 11 on page 13 of said bill of complaint immediately after "New York" and immediately before "command", the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

5. By inserting in line 19 of page 13 of said bill of complaint immediately after "New York" and immediately before "from" the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

Signed—BEN SNEEDEN,
As Receiver of the City National Bank of Herrin, of Herrin, Illinois.

Signed—HOSEA V. FERRELL and
Signed—JOHN HAY
Solicitors for Complainant.

Endorsed: * * (Caption) * * Amendment to Bill of Complaint. Filed Dec. 22, 1931. D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Bldg., Marion, Illinois.

Dec. 22, 38 And afterwards, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Answer of the defendant Ray C. Carroll, as Treasurer of the City of Marion, Illinois, which said Answer was and is in words and figures, the following, to-wit:

38½ * * (Caption) * *

ANSWER OF THE DEFENDANT, RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS, TO THE BILL OF COMPLAINT.

And Now comes the defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois, and for answer to the bill of complaint in this cause as amended says that he adopts as his answer to said bill of complaint as amended the answer

made and filed for and on behalf of the defendant, City of Marion, Illinois.

Sgd—R. T. Cook & Pope & Driemeyer,
Attorneys for Defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois.

Endorsed: * * (Caption) * * Answer of the Defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois, to the Bill of Complaint. Filed Dec. 22, 1931. D. H. Reed, Clerk.

39 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Answer of Continental Illinois Bank and Trust Company, which said Answer was and is in words and figures, the following, to-wit: Filed Dec. 1931.

40 * * (Caption) * * *

THE ANSWER OF CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION, ONE OF THE DEFENDANTS, TO THE BILL OF COMPLAINT OF BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS, COMPLAINANT.

Continental Illinois Bank and Trust Company, a corporation, one of the defendants in the above entitled cause, answering the bill of complaint, hereby adopts as its answer to the bill filed in this case the joint and several answers made and filed for and on behalf of the City of Marion, Illinois and The Fidelity and Casualty Company of New York, certain of the defendants herein.

Continental Illinois Bank and Trust Company, a corporation, one of the defendants herein.
By—Signed—Mayer, Meyer, Austrian & Platt
Its Solicitors.

Endorsed: * * (Caption) * * Answer of Continental Illinois Bank and Trust Company, one of the defendants herein. Filed Dec. 22, 1931. D. H. Reed, Clerk. Mayer, Meyer, Austrian & Platt, 231 South LaSalle Street, Chicago.

41 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Joint and Several Answers of the City of Marion, Illinois, and the Fidelity and Casualty Company of New York, which said Joint and Several Answers was and is in words and figures, the following, to-wit:

42 * * (Caption) * *

JOINT AND SEVERAL ANSWERS OF THE CITY OF MARION, ILLINOIS AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK TO THE BILL OF COMPLAINT OF BEN SNEEDEN, RECEIVER, ETC., COMPLAINANT.

For answer to the bill of complaint of the complainant in the above entitled cause, the defendants, City of Marion, Illinois and The Fidelity and Casualty Company of New York, severally answering, say:

1. Answering the first paragraph of the bill, these defendants admit the allegations therein contained.

2. Answering the second paragraph of the bill, these defendants admit the allegations therein contained.

3. Answering the third paragraph of the bill, these defendants admit that The City National Bank of Herrin failed to open for business on October 21, 1931 and has remained closed and suspended ever since, and that prior to the suspension of said Bank it owned the bonds and securities in the third paragraph of the bill of complaint described, subject, however, to the lien of these defendants thereon.

4. Answering the fourth paragraph of the bill these defendants admit the allegations therein contained.

5. Answering the fifth paragraph of the bill, these defendants admit the allegations therein contained, but not the legal effect of the Federal or State Statutes therein quoted.

43 6. Answering the sixth paragraph of the said bill, these defendants admit that said The City National Bank of Herrin did, prior to the 25th day of August, 1931, deposit with defendant, Continental Illinois Bank and Trust Company, the bonds and securities of said The City National Bank of Herrin in paragraph Three of the bill described; these defendants say that said deposit of such bonds and securities by said The City National Bank of Herrin with Con-

tinental Illinois Bank and Trust Company was made under these circumstances:

Ray Carroll had been appointed Treasurer of the City of Marion and was required as such Treasurer to execute bond with good and sufficient security to be approved by the council payable to said City and conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer according to law and the ordinance of said City; said Carroll applied to the defendant, The Fidelity and Casualty Company of New York, which was then and now is engaged in the surety business, to execute as surety his official bond as such Treasurer, and this defendant, The Fidelity and Casualty Company of New York, agreed to execute as surety the official bond of said Carroll, as such Treasurer, provided said Carroll could procure a bank which would secure the deposit of the public money of the City of Marion by him made in said bank by pledge of some of its assets which would be satisfactory to the defendant, The Fidelity and Casualty Company of New York, as collateral security therefor; there was then no bank in the said City of Marion, and The City National Bank of Herrin, upon being informed of the situation as in this paragraph of this answer heretofore expressed, agreed with said Ray Carroll and the defendant, The Fidelity and Casualty Company of New York, that if said Ray Carroll would deposit in said bank the public money of the City of Marion coming into his hands as Treasurer, it would deposit with the defendant, Continental Illinois Bank and Trust Company, the bonds and securities in Paragraph Three of the bill of complaint described for the purposes and under the terms and conditions as expressed and contained in the document in Paragraph Six of the bill of complaint referred to and a correct copy of which is annexed to the bill of complaint and identified as "Exhibit A"; thereupon said The City National Bank of Herrin
44 did transmit to the defendant, Continental Illinois Bank and Trust Company, the bonds and securities in Paragraph Three of the bill of complaint described, with the original of the document a copy of which is annexed to the bill of complaint herein and identified as "Exhibit A" executed by its officers, R. A. Karr, its Vice-President, and Joe P. Benson, its Cashier; after said bonds and securities were received by the defendant, Continental Illinois Bank and Trust Company, and the original of said document identified as "Exhibit A" to the bill of complaint herein had been ex-

ecuted by the Assistant Secretary of said Continental Illinois Bank and Trust Company, the defendant, The Fidelity and Casualty Company of New York, executed, as surety, the official bond of said Ray Carroll, as Treasurer of the City of Marion, and said Ray Carroll, as such City Treasurer, did then make his initial deposit of public money of the City of Marion in said The City National Bank of Herrin; these defendants further answering say that all deposits of public money of the City of Marion made in The City National Bank of Herrin by said Ray Carroll, as Treasurer, were made only because of the security given by said bank therefor, and that said deposits would not have been made except for the fact that they were secured in manner and form as herein stated, and that the defendant, The Fidelity and Casualty Company of New York, would not have executed, as surety, the bond of said Ray Carroll, as such City Treasurer, if said agreement for the securing of the deposits by said Ray Carroll, as Treasurer, so made had not been made and entered into; these defendants further answering say that the securities in Paragraph Three of the bill of complaint described now remain in the custody of Continental Illinois Bank and Trust Company, as Trustee, under the provisions of the agreement hereinabove referred to; these defendants deny that complainant is entitled to the possession of said bonds and securities above mentioned and say that the defendant, Continental Illinois Bank and Trust Company, is entitled to the possession of said securities for all of the uses and purposes in said agreement hereinabove referred to expressed.

7. Answering the seventh paragraph of said bill, these defendants deny that the deposit by said The City National Bank of Herrin of the aforementioned bonds and securities with said Continental Illinois Bank & Trust Company
45 was illegal and void for any of the reasons in said paragraph of said bill mentioned; these defendants say that there was no statute of the State of Illinois in force and effect at any of the times in question prohibiting banking institutions other than National Banks in the State of Illinois from giving security for the safe keeping and prompt payment of public moneys deposited with them of the kind and character and in the manner as was done by The City National Bank of Herrin as alleged in the bill of complaint herein, and that under the law of the State of Illinois banking institutions in the State of Illinois other than National Banks

were at the time of the transactions in question authorized to give security for the safe keeping and prompt payment of public moneys with them deposited in manner and form as did The City National Bank of Herrin, as alleged in the bill of complaint herein; these defendants admit that The City National Bank of Herrin was not at the time of any of the deposits made with it by Ray Carroll, as City Treasurer of Marion, located in said City of Marion, and that said City National Bank did not execute at the time of receiving said deposits a bond with sureties approved by the President of the Council of the City of Marion conditioned that said Bank would safely keep and account for and pay over said moneys, or any other bond whatsoever; these defendants further answering deny that said The City National Bank of Herrin did not before any of said deposits were made enter into an obligation with said City Council of the City of Marion to pay to its Treasurer interest on the monthly balance of deposits of city money in such bank made, but these defendants say that said The City National Bank of Herrin did agree to pay to the City of Marion interest on the monthly balance of deposits of city money in such bank at the rate of three per cent per annum; these defendants further answering deny that no resolution of the Board of Directors of the said The City National Bank of Herrin was ever adopted or passed by said Board authorizing or empowering the officers of said Bank to deliver or pledge said bonds and securities aforementioned, or any part thereof, in manner and form as was done, but say that as a matter of fact, the Board of Directors of said The City National Bank of Herrin did, at a meeting by them held on the 13th day of June, 1930, adopt a resolution of which the following is a true copy:

46. "Resolved that the President and Cashier of The City National Bank of Herrin, Illinois, be hereby empowered to set aside with any third party as Trustee any of the unpledged assets of the said Bank as security for a deposit in said Bank of any funds so deposited by any School Treasurer, City Treasurer, Township Treasurer, State Treasurer, Postmaster depositing postal savings funds, or any Receiver for any closed bank or other public institution, in conformity to law to secure such deposit which belongs to any of the municipalities or public institutions represented by said depositor. Said assets so pledged to be held by the designated Trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guar-

antee of the lawful acts of said depositor in his official capacity."

These defendants further answering say that the deposit of the securities of The City National Bank of Herrin with the defendant, Continental Illinois Bank and Trust Company, for the purpose of securing the deposit of the public money of the defendant, City of Marion, Illinois, was made by the officers of said The City National Bank of Herrin pursuant to authority expressly granted by the Board of Directors of said Bank and that said deposit agreement, a copy of which is annexed to the bill of complaint herein and identified as "Exhibit A", was executed by R. A. Karr, then Vice-President of said The City National Bank of Herrin because of the illness of John Alexander, President of said Bank and his inability to perform the duties of the office of President of such Bank; these defendants further answering say that the pledge of said securities to secure the deposit of public money of the City of Marion in manner and form as was done was, in any event, an act within the apparent authority of the officers of said Bank by whom such deposit of securities with Continental Illinois Bank and Trust Company was made, and that these defendants were fully warranted in relying upon and did rely upon the authority of said officers to make and enter into such obligation upon the part of said Bank; further answering these defendants say that the pledge of its securities by The City National Bank of Herrin was thereafter and with knowledge of the facts fully ratified by the Board of Directors of said Bank.

47 These defendants deny that the delivery of said bonds and securities was a fraud upon the general creditors and depositors of said The City National Bank of Herrin, and deny that such delivery of such bonds and securities was without the powers of said Bank and the officers thereof or was an ultra vires act of said officers and of said Bank and was and is wholly void and of no force and effect; these defendants further deny that no title to or interest in or lien upon or lien against said bonds and securities, or any part thereof, was acquired by any of the defendants herein by the aforesaid delivery thereof to said Continental Illinois Bank & Trust Company and that none of said defendants have any title to or interest in or lien upon said bonds and securities; these defendants further answering say that they each have the right to have the bonds and securities of The City National Bank of Herrin deposited with Continental Illinois

Bank & Trust Company held and disposed of by Continental Illinois Bank & Trust Company for the uses and purposes in said depository agreement stated, and for the purpose of securing payment to the City of Marion of its public money deposited with said The City National Bank of Herrin; these defendants admit that the money of the City of Marion, Illinois deposited in said The City National Bank of Herrin, as aforesaid, was not at the times of such deposits, or at any other time, the money of the United States, but deny that complainant is entitled to the possession and custody thereof.

8. Answering the eighth paragraph of said bill, these defendants admit that the agreement annexed to the bill of complaint as Exhibit "A" contains the provisions as are in said paragraph of said bill alleged; they admit that the bonds and securities deposited with the defendant, the Continental Illinois Bank & Trust Company, are negotiable in character and are transferable by delivery. These defendants, however, say that they have no information as to the number of depositors or creditors of said The City National Bank of Herrin, or as to the amount of their deposits.

9. Answering the ninth and tenth paragraphs of the said bill, these defendants admit that the complainant did, on the 11th day of November, 1931, send to these defendants, and these defendants further admit that they are advised that the complainant did at the same time send to the defendant,
48 Continental Illinois Bank & Trust Company, a letter in form the same as the copy thereof annexed to the bill of complaint as Exhibit "B", but these defendants say that complainant was wholly without any right or authority to disaffirm or repudiate the pledge of the bonds and securities hereinabove mentioned by The City National Bank of Herrin with Continental Illinois Bank & Trust Company for the purpose of securing the deposits of the public money of the defendant, City of Marion, in said The City National Bank of Herrin, and that such letter and attempted repudiation by complainant however made was wholly void and of no effect.

10. Answering the eleventh paragraph of the said bill, these defendants say that The Fidelity and Casualty Company of New York is surety on the official bond of Ray Carroll, as City Treasurer, to the City of Marion, Illinois.

11. As defenses of law in this case these defendants say:

(a) That The City National Bank of Herrin had power and authority to pledge its bonds and securities, forming part

of its assets to secure the deposit with it of the public money of the defendant, City of Marion, Illinois, in manner and form as appears by the allegations in the bill of complaint in this case to have been done.

(b) It appears upon the face of the bill of complaint that The City National Bank of Herrin received the full benefit of the deposits of the public money of the defendant, City of Marion, Illinois, a political subdivision of the State of Illinois, a political subdivision of the State of Illinois, in said bank made by Ray Carroll, as City Treasurer of Marion, and that being true and the public money of the City of Marion having been deposited in said bank in reliance upon and because of the security afforded it by reason of the deposit of the bonds and securities of The City National Bank of Herrin in Continental Illinois Bank & Trust Company, complainant, as Receiver of The City National Bank of Herrin, should not be allowed to recover said bonds and securities except upon payment to the defendant, City of Marion, of the amount of its public money on deposit in said The City National Bank of Herrin.

49 (c) That the law of the State of Illinois permits banks located in such state to pledge securities by them owned to secure deposits of public money of political subdivisions of the State in manner as appears by the allegations of the bill of complaint herein to have been done, and that, therefore, The City National Bank of Herrin was authorized and empowered to secure the deposit of the public money of the defendant, City of Marion, with it in manner as was done; that the provisions of the Illinois statute in Paragraph Five of the bill of complaint referred to are not intended to and do not limit the power or authority of banks as to the manner in which they shall transact business or curtail powers otherwise existing, whether specifically granted by statute or implied by law, but the provisions of such statute are intended simply for the protection of the City Treasurer and to relieve him from the usual absolute duty to account for any funds of the City that might come into his hands by complying with the provisions of such statute; that such statute is not intended or designed as a method of escape for a bank from obligations it may have assumed or purported to assume because of non-compliance by a City Treasurer upon his part with the provisions of such statute in the making of a deposit of public money of the City.

(d) That the officers of The City National Bank of Herrin

were fully authorized by the resolution of the Board of Directors of said bank theretofore adopted to pledge the bank's securities with Continental Illinois Bank and Trust Company for the purposes of securing the deposits of the public money of the City of Marion; but that even if such resolution had not been so adopted such deposit of bonds so made by the officers of said bank would have been valid inasmuch as such an act done by the officers of said bank in the usual transaction of its business was one within their actual, or in any event, within their apparent authority as officers of said bank; that even if the action of said officers had not been specifically authorized the retention by said bank of the public money of the City of Marion deposited with it was of itself a ratification of such pledge.

50 (e) That inasmuch as The City National Bank of Herrin could not itself have disaffirmed the contract made by it pledging its bonds or securities as security for the deposit of the public money of the City of Marion, and could not itself have recovered its assets pledged thereunder, complainant, as Receiver of such Bank, cannot disaffirm such contract and recover the assets of the Bank pledged thereunder and, in any event, he could not repudiate such contract and at the same time retain its fruits, that is to say, the public money of the City of Marion on deposit with said Bank and secured by the pledge of said Bank's securities.

(f) That the defendant The Fidelity and Casualty Company of New York is entitled as fully to the benefit of the bonds and securities of The City National Bank of Herrin now deposited with the defendant, Continental Illinois Bank and Trust Company, as is the defendant, City of Marion, Illinois, and that in the event the defendant, The Fidelity and Casualty Company of New York, should be required to pay to the defendant, City of Marion, Illinois, the amount of public money of the defendant, City of Marion, on deposit in said The City National Bank of Herrin, then the defendant, The Fidelity and Casualty Company of New York is and should be fully subrogated to all of the rights of the defendant, City of Marion, Illinois, as against said bonds and securities of The City National Bank of Herrin deposited with the defendant, Continental Illinois Bank and Trust Company.

12. Wherefore, these defendants having fully answered the bill of complaint, deny that the complainant is entitled to the relief demanded, or any part thereof, and pray to be hence

dismissed with their reasonable charges in this behalf most wrongfully sustained.

CITY OF MARION, ILLINOIS and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By R. T. COOK (Signed)
Sgd—C. E. POPE
Sgd—H. F. DRIEMEYER
Their Solicitors.

51 Endorsed: * * (Caption) * * Answer of Defendants, City of Marion and The Fidelity and Casualty Company of New York. Filed Dec. 22, 1931. D. H. Reed, Clerk. Pope & Driemeyer, Attorneys and Counselors at Law, 24 North Main Street, East St. Louis, Illinois.

d Dec. 22. 52 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

53 * * (Caption) * *.

Tuesday, December 22nd, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 22nd day of December, A. D. 1931, comes the plaintiff Ben Sneeden, as Receiver of The City National Bank of Herrin, by his attorneys Ferrell and Hay, and come also Defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a Corporation, the Fidelity and Casualty Company of New York, a Corporation and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, by their attorneys, Pope & Driemeyer, Ralph Cook and Mr. Moyer, respectively. And now on motion of Ferrell and Hay, attorneys for the plaintiff herein, and by agreement of the parties hereto, the court being fully advised in the premises, it is ordered by the court that the said plaintiff be, and he is hereby granted leave to amend bill of complaint filed herein, by making Ray Carroll, City Treasurer of Marion, Illinois, party defendant, which said amendment is then and there effected.

And now comes the Continental Bank & Trust Company one of the defendants herein, and by leave of the court first had and obtained withdraws their motion to dismiss bill of complaint heretofore filed herein. And now upon due motion and by agreement of Counsel, it is ordered by the court that the answers of the defendants City of Marion and Fidelity Casualty Company heretofore filed herein be, and they are hereby extended to the bill of complaint as amended herein.

And now all of the said defendants having filed herein their respective answers to the bill of complaint and issues being joined, it is ordered by the Court that in accordance with agreement by and between the parties hereto, this cause be submitted on signed stipulation of facts, which is then and there filed and presented, and now this cause come on further for hearing upon the issues herein, and consideration of said signed stipulation of facts, after hearing the issues and said stipulation of facts and arguments of respective counsel hereto, It Is Ordered by the Court that said cause be, and the same is hereby taken under advisement and that the respective counsel hereto submit briefs for consideration of the court at the earliest possible moment.

54 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in open Court in said Cause, and presented to the Court, a Stipulation of Facts, which said Stipulation of Facts, was and is in words and figures, the following, to-wit: Filed Dec. 2 1931.

55 * * (Caption) * *

STIPULATION OF FACTS:

It Is Hereby Stipulated and Agreed by and between the complainant, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, and the defendants, City of Marion, Illinois, Continental Illinois Bank and Trust Company, Ray Carroll, as Treasurer of the City of Marion, Illinois, and The Fidelity and Casualty Company of New York, that this case shall be heard and disposed of by the Court upon the following agreed statement of facts and such other testimony as either party may offer and received by the Court upon the hearing of this cause.

1. The averments contained in Paragraphs One, Two, Three, Four and Five of the bill of complaint shall be taken as true, with the limitation that this admission shall not be understood to qualify in any manner the contention of the defendants therein as to their right, title or interest in and to the bonds and securities in Paragraph Three of the bill of complaint described.

56 2. Prior to August 25, 1931 Ray Carrol had been appointed Treasurer of the City of Marion. He was required as such Treasurer to execute bond with good and sufficient surety to be approved by the President of the Council of said City payable to said City and conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to law and the ordinance of said City. Carroll applied to the defendant, The Fidelity and Casualty Company of New York, which was then and is now engaged in the surety business, to execute as surety his official bond as such Treasurer. The defendant, The Fidelity and Casualty Company of New York, agreed to execute as surety the official bond of said Carroll, as such Treasurer, provided said Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by him made in said Bank by pledge of some of its assets which would be satisfactory to The Fidelity and Casualty Company of New York as collateral security therefor. There was then no bank in the City of Marion. Ray Carroll, as Treasurer, William Below, Finance Commissioner of the City of Marion, and an agent of The Fidelity and Casualty Company of New York, discussed with Joe P. Benson, Cashier of The City National Bank of Herrin, the question of that Bank securing the deposit of the public money of Marion in it by the pledge of its securities, and an agreement was made between said Benson and said Carroll, Below and the Agent of The Fidelity and Casualty Company of New York, that if said Carroll would deposit in said Bank the public money of the City of Marion coming into his hands as Treasurer, said Bank would deposit with Continental Illinois Bank and Trust Company the bonds and securities in

57 Paragraph Three of the bill of complaint described to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the deposit of the public money of Marion. Mr. Benson stated to Mr. Carroll, Mr. Below and the agent of The Fidelity and Casualty Company

of New York that Continental Illinois Bank and Trust Company had a standard form of agreement used by it in accepting deposit with it of bonds or securities for the purpose of securing deposits in other banks. Mr. Benson thereupon advised R. A. Karr, Vice-President of The City National Bank of Herrin, of the arrangement he had made for accepting deposits of the public money of Marion, and Mr. Karr approved the arrangement made and did, with Mr. Benson, as Vice-President and Cashier, respectively, of The City National Bank of Herrin, execute an agreement, a true copy of which is annexed to the bill of complaint herein as "Exhibit A". Mr. Benson thereupon transmitted to Continental Illinois Bank and Trust Company the bonds and securities described in Paragraph Three of the bill of complaint with the executed copy of the document a copy of which is annexed to the bill of complaint and identified as "Exhibit A". After the arrangement had been made between Mr. Benson, Mr. Carroll, Mr. Below and Agent of The Fidelity and Casualty Company of New York hereinabove expressed, The Fidelity and Casualty Company of New York did execute the official bond of said Carroll, as City Treasurer, and a copy of such bond is annexed to this stipulation and is identified as "Exhibit A". R. A. Karr, as Vice-President, executed the document a copy of which is annexed to the bill of complaint as "Exhibit A" because of the absence of John Alexander,
President of the Bank, who resided in Murphysboro, due
58 to illness. The deposits of public moneys of the City of
Marion made in The City National Bank of Herrin by Ray Carroll, as Treasurer, were made by him pursuant to the arrangements and agreements hereinabove expressed. Mr. Benson informed the Directors of The City National Bank of Herrin of the arrangement which he had made and of the fact that the Bank's bonds had been pledged as security for the deposit of the public money of the City of Marion, and while no formal action was taken by the Board of Directors at a meeting of the Board, the matter was discussed at Board meetings and with the Directors individually and the various Directors acquiesced in the action taken. Mr. Benson, as Cashier of The City National Bank of Herrin, agreed with Carroll and Below that the Bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum payable monthly on average balances in excess of Five Thousand Dollars ($5000.00). The

City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the deposit of the public money of the City of Marion in any form whatsoever. The deposit of the public money of the City of Marion made in The City National Bank of Herrin was on checking account and the City Treasurer drew checks against the deposit from time to time in the ordinary course of business, which were accepted and paid by the Bank.

3. The bonds described in Paragraph Three of the bill of complaint remain in the custody of Continental Illinois Bank and Trust Company, which continues to hold them subject to the terms and provisions of the document a copy of which is annexed to the bill of complaint and identified as "Exhibit A".

59 4. It is further stipulated and agreed that the document annexed hereto and identified as "Exhibit B" is a true copy of the minutes of a meeting of the Board of Directors of The City National Bank of Herrin held on June 13, 1930. It is further stipulated and agreed that Joe P. Benson, if called as a witness, would identify the document hereto annexed and identified as "Exhibit C" as a true copy of the resolution referred to in the last paragraph of said minutes.

5. The bond executed by The Fidelity and Casualty Company of New York and a copy of which is hereto annexed as Exhibit "A", while dated August 17th, 1931, was not delivered by The Fidelity and Casualty Company of New York to the City of Marion, Illinois until after the bonds and securities of The City National Bank of Herrin, described in paragraph Three (3) of the Bill of Complaint, had been actually deposited by The City National Bank of Herrin with Continental Illinois Bank and Trust Company for the purposes hereinabove mentioned.

6. The City National Bank of Herrin made a statement of its condition in the latter part of September, 1931, which was published. This was the only statement of condition that was published subsequent to July 31st, 1931. In that statement no reference was made to the fact that the bonds and securities, described in paragraph Three (3) of the Bill of Complaint, had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the Bank had been pledged to secure other deposits. In the form of statement of its condition required to be pub-

lished by the Bank, no provision was made for a statement as to the existence of such pledges.

60 Dated—December 22nd, 1931,

BEN SNEEDEN, As Receiver of the City National Bank of Herrin

By (Signed) HOSEA V FERRELL &
(Signed) JOHN HAY
Its Attorneys

CITY OF MARION, ILLINOIS
By (Signed) R T COOK
Its Attorneys

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY
By (Signed) MAYER, MEYER, AUSTRIAN & PLATT
Its Attorneys

RAY CARROLL, As Treasurer of the City of Marion,
By (Signed) R T COOK
His Attorneys

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By POPE AND DRIEMEYER
Its Attorneys

61

No. 1405523

The Fidelity and Casualty Company of New York

Home Office, 80 Maiden Lane, New York City

Bonding Department, Hale Anderson, Superintendent in Charge

Know All Men by These Presents, that we, Ray C. Carroll, as Principal, and The Fidelity and Casualty Company of New York, as Surety, are held and firmly bound unto the City of Marion, in the penal sum of Twenty-Five Thousand Dollars ($25,000.00) lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 17th day of August, A. D. 1931.

The Condition of the Above Obligation Is Such, that, whereas, the above bounden Ray C. Carroll, was, on the 17th day of August, A. D. 1931, duly elected (or appointed, as the

case may be) to the office of City Treasurer of the City of Marion. Now, if the said Ray C. Carroll, shall well, truly and faithfully discharge and perform the duties of the said office, and shall, at the expiration of his term of office, surrender the said office and pay over all moneys in his hands by him held by virtue of said office, and deliver all books, papers, furniture and appurtenances of said office to his legally qualified successor, or in case of his removal from said office or resignation thereof before the expiration of his term of office, shall surrender the same and all the appurtenances thereof, to the person appointed to receive the same, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and delivered the day and your above written.

(Signed) RAY C. CARROLL
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By (Signed) THORLEIF NARUP
Attorney.

(Seal)

62 The Fiedlity and Casualty Company of New York

The Pioneer Bonding Company of the United States

Bonding Department: Hale Anderson, Vice-President, in charge
92 Liberty Street, New York City

Know All Men by These Presents:

That The Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make, constitute, and appoint Thorleif Narup, of Chicago Illinois its true and lawful attorney for it and in its name, place, and stead to execute on behalf of the said Company, as surety, bonds, undertakings, and contracts of suretyship to be given to all obligees provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of one hundred thousand dollars.

In Witness Whereof The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its assistant secre-

taries and attested by one of its assistant secretaries this 18th day of April, 1928.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By ALBERT BRUNS
Assistant Secretary.

Attest:
WM. P. HARVEY
Assistant Secretary.

Bond 1245, 10M
(30061424)

63 (Back)

State of New York, }
County of New York, } ss.:

WM. P. HARVEY, being duly sworn, deposes and says:

That he is an assistant secretary of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the instrument overleaf; that he knows the corporate seal of the said corporation; that the seal affixed to the instrument overleaf is the corporate seal of The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of the said Company; that he signed his name thereto by like order and authority; that he is acquainted with Albert Bruns, and knows him to be an assistant secretary of the said Company; that the signature of the said Albert Bruns subscribed to the said instrument is in the genuine handwriting of the said Albert Bruns, and was thereto subscribed by order and authority of the said board of directors of the said Company; that the said Company is duly and legally incorporated under the laws of the State of New York, and has complied with and is now complying with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds.

The deponent further states that the following is a true copy of an extract from the minutes of a meeting of the board of directors of the said Company held at its office in the City of New York on the 18th day of April, 1928, a quorum being present, and the resolutions contained in the said extract were unanimously adopted and are now in full force and effect:

"Resolved, That Robert J. Hillas, the president of the Company, be, and that he hereby is, and that Hale Anderson, a vice-president of the Company, be, and that he hereby is, authorized to execute powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and all contracts of suretyship; and that any vice-president, the vice-president and secretary, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach thereto the seal of the Company."

"Resolved, That either Albert Bruns or William P. Harvey, each an assistant secretary of the Company, be and that he hereby is authorized to executed alone powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and all contracts of suretyship, not exceeding one hundred thousand dollars in amount; and that any vice-president, the vice-president and secretary, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach hereto the seal of the Company."

WM. P. HARVEY
Assistant Secretary.

Sworn to before me this 18th day of April, 1928.

FLORENCE CARROLL
Commissioner of Deeds,
City of New York.

I, Frank B. Smedes, and assistant secretary of The Fidelity and Casualty Company of New York, do hereby certify that I have compared the copy of the power of attorney overleaf and the foregoing copy of the affidavit annexed to the said power of attorney with the originals now on file in the home office of the said Company, and that the same are correct transcripts therefrom and of the whole of the said originals, and that the said power of attorney has not been revoked and is now in full force and effect.

64 In testimony whereof I have hereunto set my hand and affixed the seal of the said Company this 17th day of August, in the year of one thousand nine hundred and Thirty-one.

FRANK B. SMEDES
Assistant Secretary.

State of Illinois } ss.:
County of Cook }

I, Cleo M. Riley, a Notary Public of Cook County, in the State of Illinois, do hereby certify that Thorleif Narup, Attorney of The Fidelity and Casualty Company of New York, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of The Fidelity and Casualty Company of New York for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, in said County, this 17th day of August, A. D. 1931.

(Signed) CLEO M. RILEY
Notary Public.

Bond, 1353, 2M*
(3103490)

65

June 13, 1930

The directors of the City National Bank met at the bank, Friday, June 13, 1930 at 4:00 P. M. Directors present were John Alexander, W. C. Alexander, R. A. Karr, A. J. Will and Joe P. Benson.

Moved by W. C. Alexander, seconded by A. J. Will that a form resolution authorizing the borrowing of funds from the First National Bank, St. Louis and the Continental Illinois Bank and Trust Company, Chicago, be approved. Carried.

Moved by W. C. Alexander, seconded by R. A. Karr that the cashier be authorized to sell $25,000.00 bonds and securities of the bank and apply the proceeds on the bank bills payable. Carrier.

The attached resolution relating to pledge of collateral for deposit of public funds and postal savings funds was adopted.

JOHN ALEXANDER,
Pres.
JOE. P. BENSON,
Cashier.

Copy

66 Copy

City National Bank
Herrin, Illinois

We, the undersigned, John Alexander, President and Joe P. Benson, Cashier, of the City National Bank of Herrin, Illinois, hereby certify that a regular monthly meeting of the Board of Directors of the said Bank held at the bank Friday, June 13, 1930, at 4:00 P. M., present, John Alexander, W. C. Alexander, R. A. Karr, A. J. Will and Joe P. Benson, the following resolution was adopted and spread upon the minutes:

Resolved that the President and Cashier of the City National Bank of Herrin, Illinois, be hereby empowered to set aside with any third party as trustee any of the unpledged assets of the said bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law to secure such deposit which belongs to any of the municipalities or public institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity.

And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed.

Witness our hands and seals and the seal of this bank this 13th day of June, 1930.

CITY NATIONAL BANK, HERRIN, ILLINOIS
JOHN ALEXANDER,
President.
JOE P. BENSON,
Cashier.

Endorsed: Filed Dec 22-1931 D. H. Reed, Clerk.

70 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, the following further proceedings were had in said court in said Cause, and entered of record, to-wit:

71 * * (Caption) * *

Entered D
1931.

ORDER OF COURT.

Now on this 22d day of December, A. D. 1931, this cause comes on for hearing upon the bill of complaint and answer thereto, and upon written stipulation of facts, and arguments of counsel being presented to this Court, the Court takes this cause under advisement.

It is ordered, adjudged and decreed by the Court that the former temporary restraining order heretofore entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time con-

72 tinued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 31st day of December, A. D. 1931.

The reasons for the entering of this order extending the aforesaid former order and decree are that this cause has been heard by the Court, and the Court desires to take the same under advisement without rendering an immediate decision on the issues involved herein, and desires that counsel for the respective parties hereto may submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 31st day of December, A. D. 1931, at the hour of 10 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10 o'clock in the forenoon of the 22 day of December, A. D. 1931.

(Signed) FRED L. WHAM
Presiding Judge.

73 Endorsed: * * (Caption) * * Order of Court Filed and Entered Dec. 22-1931 D. H. Reed, Clerk Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

d Dec. 31. 74 And afterwards, to-wit: on the 31st day of December, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

75 * * (Caption) * *

ORDER OF COURT.

Now on this, the 31st day of December, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 9th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

76 The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 9th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 31st day of December, A. D. 1931.

(Signed) FRED L. WHAM
Presiding Judge.

77 Endorsed: * * (Caption) * * Order of Court. Filed and Entered 10:00 a. m. December 31-1931 D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

78 And afterwards, to-wit: on the 9th day of January, A. D. 1932, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered Ja 1932.

79 * * (Caption) * *

ORDER OF COURT.

Now on this, the 9th day of January, A. D. 1932, it is ordered adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued
80 and extended in full force and effect until the 19th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 19th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 9th day of January, A. D. 1932.

(Signed) FRED L. WHAM
Presiding Judge.

81 Endorsed: * * (Caption) * * Order of Court Filed January 9, 1932 D. H. Reed, Clerk Law Offices of Ferrell and Hay First National Bank Building, Marion, Illinois.

Jan. 19. 82 And afterwards, to-wit: on the 19th day of January, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record to-wit:

83 * * (Caption) * *

ORDER OF COURT.

Now on this, the 19th day of January, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 29th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
84 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants whille this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 29th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 19th day of January, A. D. 1932.

Signed—Fred L. Wham
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Jan 19 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

85 And afterwards, to-wit: on the 29th day of January A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered J 1932.

86 * * * (Caption) * *

ORDER OF COURT.

Now on this, the 29th day of January, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be, and the same is hereby continued and extended in full force and effect until the 6th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of

87 said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 6th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 29th day of January, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Jan. 29-1932 D. H. Reed, Clerk. U. S. Dist. Court. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

Fd Feb. 6. 88 And afterwards, to-wit: on the 6th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

89 * * (Caption) * *

ORDER OF COURT.

Now on this, the 6th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 16th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
90 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 16th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 6th day of February, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Feb. 6-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

91 And afterwards, to-wit: on the 16th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record to-wit: Entered Fe 1932.

92 * * (Caption) * *

ORDER OF COURT.

Now on this, the 16th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 26th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
93 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 26th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 16th day of February, A. D. 1932.

Signed—Fred L. Wham
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Feb 16 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

Filed Feb. 26, 32.

94 And afterwards, to-wit: on the 26th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

95 * * (Caption) * *

ORDER OF COURT.

Now on this, the 26th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 7th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein

96 to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 7th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 26th day of February, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Entered February 26-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

97 And on the 7th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered M. 7, 1932.

98 * * (Caption) * *

ORDER OF COURT.

Now on this, the 7th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 17th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through
99 the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 17th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 7th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Ent Mareh 7-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

ed March 1932.

100 And afterwards, to-wit: on the 17th day of March, A. D. 1932, the following further proceedings were had in said court in said Cause, and entered of record to-wit:

101 • • (Caption) • •

ORDER OF COURT.

Now on this, the 17th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 26th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of

102 said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 26th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 17th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: • • (Caption) • • Order of Court. Ent March 17-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

103 And afterwards, to-wit: on the 21st day of March, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, and entered of record therein, Memoranda Opinion of the Court, which said Memoranda was and is in words and figures, the following, to-wit:

104 * * (Caption) * *

Wham, J.

By his bill the plaintiff, receiver of The City National Bank of Herrin, seeks to have the delivery and pledge of certain bonds by said bank to secure a deposit prior to the appointment of the receiver, of funds of the City of Marion, Illinois, by Ray C. Carroll, as City Treasurer, held an illegal and ultra vires act on the part of said bank and its officers; to have the defendants enjoined from disposing of said bonds and to have the same returned to the plaintiff. Plaintiff alleges that the pledge of assets of the bank to secure a deposit was not only beyond the power of the bank but was against public policy and constituted a fraud upon the bank's other creditors and depositors, and, further, that the making of this pledge by the officers was not authorized by the Board of Directors. The defendants by their joint answer deny that the plaintiff is entitled to the return of said bonds and deny that the pledge of said bonds was ultra vires, illegal and void; deny that such act was against public policy and a fraud on the other creditors and depositors of the bank and say that the funds so deposited were public moneys for the securing of which the said bank had a lawful right to pledge a portion of its assets, and that the officers so doing were authorized by the Board of Directors so to do, and their
105 acts were subsequently approved and acquiesced in by the Board. Upon application of the plaintiff, a temporary restraining order was issued restraining disposition of said bonds, and by agreement of the parties the entire matter was submitted to the court upon stipulation of facts for a determination of the merits of the case without a separate hearing upon plaintiff's application for preliminary injunction.

No evidence was taken in the case, but all the facts were stipulated in writing from which written stipulation the following findings of fact are made:

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank

located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the affairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herrin funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as
106 City Treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank

would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safekeeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the
107 president being out of the city by reason of illness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust Company with the bonds and securities described in paragraph three of the bill, and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as city treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion.
108 The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

109 10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

CONCLUSIONS OF LAW.

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so

was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temproary restraining order entered herein should be dissolved.

OPINION.

Was the agreement entered into by The City National Bank of Herrin by which it agreed to pledge a portion of its assets to secure the public moneys of the City of Marion, and the pledge of said assets pursuant to said agreement, under the circumstances there existing, beyond its powers, and void?

By Section 90, Title 12, U. S. C., (R. S. 5153, derived from Act of June 5, 1864; 13 Stat. 113), national banks, when designated by the secretary of the treasury, are made depositaries of public money and financial agents of the United States Government and are required to give satisfactory security for the faithful performance of such duties by deposit

of United States bonds and otherwise. To this section was added by way of amendment on June 25, 1930, the following paragraph:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The statutes of the State of Illinois controlling cities under the so-called "Commission Form of Government",
111 as was the City of Marion at the time of the deposit and agreement here in question, provided that the city treasurer should deposit the money received by him as treasurer in a bank in the city to be selected by the president of the council, the commissioner of accounts and finance and the treasurer or any two of them, and that before such deposits were made in the bank so chosen, the bank should be required to enter into an obligation to pay interest on monthly balances and to execute a good and sufficient bond with sureties to be approved by the president of the council conditioned that such bank safely keep and account for and pay over said money. Chapter 24, Section 316, Smith-Hurd Revised Statutes of Illinois, page 404.

There was no bank in the City of Marion on August 28, 1931 when the deposit and agreement here in question were made and it was impossible for the city treasurer of that city to comply with the statute requiring him to deposit city funds in a designated depositary in the city. The only statute directing the disposition of the public money in his hands being inapplicable, the city treasurer was under the responsibility of finding for himself a depositary for the city funds with the safest security possible. He had to keep the money available for use as the city needed it and was under personal obligation to keep it safely and account for it. He was required to give a bond guaranteeing that he would do so. Under the circumstances it would seem that he was acting within the law when he deposited the money in The City National Bank of Herrin and required a pledge of a sufficient portion of the bank's assets to assure the return of the deposit, if the bank was authorized to give such security. The
112 amendment to Section 90, Title 12, U. S. C. specifically authorized The City National Bank of Herrin to accept

public funds of the City of Marion as deposits and pledge assets to secure such deposits if the law in Illinois authorized banks within the State to give such security under similar circumstances.

No statute of the State of Illinois expressly authorizes or prohibits the giving of such security to secure public funds. Whether the law of Illinois authorizes banks within the State to give security must be determined from its banking act, the decisions of its courts, and its legislative policy as shown by its statutes touching or related to the subject.

The banking act of Illinois provides that "it shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security, and to accept and execute trusts." (Sec. 1, Chap. 16½ Smith-Hurd Illinois Rev. Stat.) The act does not further define, express or limit the power of a bank with reference to giving security for deposits of public funds.

The Illinois legislature has recognized the power of banks doing business under the laws of Illinois to secure the deposit of public funds by pledge of assets. As illustrative of such legislative recognition Sec. 29 of Chap. 130 of Smith-Hurd's Rev. Stat., authorizes the deposit of securities by banks designated as depositaries to protect State moneys. It is reasonable to conclude that if banks have the power, under the banking act of Illinois which is thus recognized by the legislature, the power also extends to the giving of similar security for any public funds of the State or political subdivision of the State.

The legislative policy thus expressed negatives the thought that the pledge by a bank of its assets to secure public
113 deposits is contrary to the public policy of the State of Illinois or should be looked upon as a fraud upon the other depositors. In the same way the 1930 amendment to Sec. 90, Title 12 negatives the thought that the pledge of assets to secure deposits of public funds of a State or political supervision thereof is contrary to public policy relating to national banks or operates as a fraud upon general depositors.

While there is no published decision in the State of Illinois which deals directly with the power of banks to pledge

their assets to secure deposits of public funds, a decision of the Supreme Court in the case of *Ward* v. *Johnson*, 95 Ill. 215, is generally recognized by the courts as laying down the broad rule that banks have the power to pledge their assets to secure deposits of any character whatsoever. Its citation in the following cases may be noted: *Williams* v. *Earhart*, 273 Pac. 728, (Ariz. 1929); *First Amer. Bank & Trust Co. et al.* v. *Town of Palm Beach*, 117 So. 900 (Fla. 1928); *U. S. Fidelity & Guar. Co.* v. *Bassfield*, 114 So. 26, (Miss. 1927); *Page Trust Co.* v. *Rose*, 135 S. E. 795, (N. C. 1926); *Cameron* v. *Christy*, 133 Atl. 551 (Pa. 1926); *Grigsby* v. *Peoples Bank*, 11 S. W. 2d, 673 (Tenn. 1928); *Pixton* v. *Perry*, 269 Pac. 144, (Utah 1928); *Schumacher* v. *Eastern Bank & Trust Co.*, 52 Fed. 2d 925, 4 CCA (U. S. 1931).

Though a careful reading of the facts dealt with in *Ward* v. *Johnson, supra,* may bring one to the conclusion that the pledge of assets there held valid was given to secure loans and deposits in the nature of loans, the broader principle therein expressed has never been questioned in Illinois by any decision or by any legislative enactment. Unquestionably, the weight of authorities in other jurisdictions, as will be hereinafter shown, supports the rule that banks, in the absence
114 of specific statutory limitation, have the power to secure the deposit of public funds by a pledge of assets of the bank.

A careful appraisal of the foregoing considerations, in my judgment, warrants the conclusion that banks in Illinois are authorized by its laws to accept a deposit of public funds and pledge assets as security, and, under the circumstances disclosed in this case, any bank in the State would have been authoribed by the laws of Illinois to accept the funds of the City of Marion and secure the same by such pledge. It follows that The City National Bank of Herrin had specific authority under Sec. 90, Title 12, U. S. C. as amended, to accept the deposit of the public funds of the City of Marion and pledge the bonds here in question as security.

It would further appear from a study of the National Banking Act, the statutes of the United States relating to security required of national banks for deposits of moneys of the United States and the trend of the decisions relating to the powers of banks that national banks have always had the power to give security for deposits of public funds by a pledge of assets.

The powers of a national bank are conferred by Rev. Stat.

Sec. 5136 (Title 12 U. S. Code, Sec. 24), which provides that such a bank shall have power to adopt and use a corporate seal, to have succession for ninety-nine years, to make contracts, to sue and be sued, to elect or appoint directors and officers, to prescribe by-laws, and—

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."

115 While not expressly given by the statute, the power of national banks to pledge their assets to secure loans has been universally recognized. This rule has been oftentimes held to include deposits in the nature of loans, the courts having regard to the substance of the transaction rather than its form. But that there are fundamental differences in the character of the indebtedness created by a loan and that created by a general deposit has been noted. Such differences are well stated by the court in *Schumacher* v. *Eastern Bank and Trust Co.*, 52 Fed. 2d 925 (CCA 4). These recognized differences between loans and general deposits have resulted in a conflict in the authorities with reference to the power of a bank to pledge its assets to assure general deposits. While we are not here directly concerned with the power of banks to secure private deposits, a distinction has generally been drawn, in considering this problem, between the power of banks to secure a private deposit and the power to secure a deposit of public funds by a pledge of assets.

The power of banks to pledge assets to secure deposits of public funds has often been recognized by legislative bodies which have apparently assumed that banks have such power and have made use of it for the protection and safe-keeping of public funds.

That the Congress of the United States early recognized that national banks had the power to pledge their assets to secure deposits of funds belonging to the United States is illustrated by Sec. 90, Title 12, U. S. C., requiring national banks, when designated by the secretary of the treasury as depositaries of public money, to give security therefor by deposit or pledge of their assets. By this section the Congress

did not confer power to pledge assets for security of deposits of public money of the United States, but thereby recognized and utilized that power in the bank under the act by
116 which it was created. (1915) 30 Op. Att'y Gen. 341.

Other statutes of the United States have similarly recognized and utilized the power of national banks to pledge their assets as security for the public funds of the United States. (Sections 192, 332 and 701, Title 12, and Section 759, Title 39 U. S. C.).

Since the Congress has recognized the power of national banks to pledge their assets as security for funds of the United States without such power being expressly given, it would seem to be a reasonable deduction that national banks likewise have the power to secure deposits of other public funds by a pledge of their assets.

The greater weight of the court decisions in the various states supports the general principle that banks have power to secure public funds by a pledge of their assets as incidental to the banking business without express statutory authority therefor. *Williams* v. *Hall,* 249 Pac. 755 (Ariz. 1926); *Williams* v. *Earhart,* 273 Pac. 728 (Ariz. 1929); *McPherson* v. *Nat'l Surety Co.,* 212 Pac. 489 (Colo. 1923); *First Amer. Bank & Trust Co. et al.* v. *Town of Palm Beach,* 117 Sou. 900 (Fla. 1928); *Andrews* v. *Odebolt Sav. Bank,* 214 N. W. 559 (Iowa 1929); *Richards* v. *Osceola Bank,* 45 N. W. 294 (Iowa 1890); *U. S. Fidelity & Guar. Co.* v. *Bassfield,* 114 So. 26 (Miss. 1929); *French* v. *School Dist.* 7 S. W. 2d 415 (Mo. 1928); *Consolidated School Dist.* v. *Citizens Sav. Bank,* 21 S. W. 2d 781, (Mo. 1929); *Ainsworth* v. *Kruger,* 260 Pac. 1055 (Mont. 1927); *Bliss* v. *Mason,* 237 N. W. 581 (Neb. 1931); *Melewen* v. *Hunker,* 299 Pac. 1075 (N. M. 1931); *Application of Broderick,* 252 N. Y. W. 68 (N. Y. 1931); *Page Trust Co.* v. *Rose,* 135 S. E. 795 (N. C. 1926); *Richmond County* v. *Page Trust Co.* 142 S. E. 786 (N. C. 1928); *Cameron* v. *Christy,* 133 Atl. 558 (Pa. 1926); *Grigsby* v. *Peoples Bank,* 11 S. W. 2d 673 (Tenn. 1929); *Pixton* v. *Perry,* 269 Pac. 444 (Utah 1928).

117 While the decisions cited are by state courts and deal with the powers of banks other than national banks, they deal with fundamental principles of banking and in the absence of controlling federal decisions are entitled to great weight in arriving at a correct interpretation of the national banking act and the powers thereby conferred. That the trend of the decisions is in favor of the interpretation giving

power to banks to pledge their assets as security for deposits of public funds has been recognized by recent decisions of the federal courts. *Burrowes* v. *Nimocks, County Treasurer,* 35 Fed. 2d, 152 CCA 4; *Schumacher* v. *Eastern Bank and Trust Company,* 52 Fed. 2d 925, CCA 4; see also *Smith* v. *Baltimore and Ohio Railroad Company,* 48 Fed. 2d, 861, D. C. Pa.

The leading cases which announce the minority rule to the effect that banks may not pledge assets to secure public deposits are *Commerciail Banking and Trust Company* v. *Citizens Trust and Guaranty Company,* 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (U. S.) 950, An. Cas. 1915c, 166; *Divide County* v. *Baird, Receiver,* 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296; *Farmers and Merchants State Bank* v. *Consolidated School District,* 174 Minn. 286, 219 N. W. 163, 65 A. L. R. 1407. Following each of the three cases last cited as found in Annotated Cases and the American Law Reports are annotations reviewing the cases. In the note prefacing the most recent annotation found in 65 A. L. R. p. 1412 the state of the authorities is expressed as follows: "There is a conflict of authority on the question of the power of a bank to pledge its assets to secure general depositors. The weight of authority supports the doctrine that a bank may make such a pledge as security for a deposit of public funds."

The 1930 amendment to Sec. 90, Title 12 seems to be the first and only act of Congress which expressly deals with the powers of national banks to give security for deposits.
118 It does not necessarily follow, however, that it constitutes an implied declaration by Congress that national banks theretofore were without any power whatsoever to give security for deposits. It does not take away or limit the power which banks already had to give security for deposits. Such power as the national banks had before the adoption of the amendment to give security for public funds they had after its adoption even though that power exceeded or otherwise differed from the authority given by a particular state to its banks.

A consideration of the problem has convinced me that national banks had the power before the adoption of the amendment and still have the power to pledge assets to secure deposits of public funds and that The City National Bank of Herrin had the power to pledge its assets to secure the deposit of the public funds of the City of Marion regardless

of the law of the State of Illinois and the said amendment of the federal law.

The foregoing conclusions dispose of the case and make it unnecessary to consider other defenses raised in the defendants' answer.

The plaintiff's bill must be dismissed for want of equity and the temporary restraining order dissolved. Decree in accordance herewith to be prepared and submitted by counsel for the defendants.

Signed FRED L. WHAM,
United States District Judge.

March 21, 1932.

March 21, 32. 119 And on the same day, to-wit: on the 21st day of March, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Findings of Fact and Conclusions of Law, which said Findings and Conclusions were and are in words and figures, the following to-wit:

120 * * (Caption) * *

The court, upon due consideration of the evidence admitted on the trial of the cause and argument of counsel heard, makes the findings of fact, and has reached the conclusions of law herein, as follows:

FINDINGS OF FACT.

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the affairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned

and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herr funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as city treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of
121 $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safe-keeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the president being out of the city by reason of illness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust Company with the bonds and securities described in paragraph three of the bill,

and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as city treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys 122 of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion. The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said

depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president
123 and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

Conclusions of Law.

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and

the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

124 3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved.

Signed—FRED L. WHAM

Endorsed: Filed March 21-1932 D. H. Reed, Clerk.

d March 1932.

125 And afterwards, to-wit: on the 26th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

126 * * (Caption) —* *

ORDER OF COURT.

And now on this the 20th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 28th day of March, A. D. 1932, at 1:30 o'clock in the afternoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court, and that the Court has arrived at his conclusions in said case, and that it is expected to enter a formal order herein on the 28th day of March, 1932, at 1:30 o'clock in the afternoon.

127 This order shall expire and is returnable on the 28th day of March, A. D. 1932, at the hour of 1:30 o'clock in the afternoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 26th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Ent March 26-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

128 And afterwards, to-wit: on the 28th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered M. 28, 1932

129 * * (Caption) * *

DECREE.

This cause came on to be heard at this Term and was argued by counsel and thereupon upon consideration thereof it was Ordered, Adjudged and Decreed as follows, viz.:

From the stipulation in writing made by the parties hereto as to the facts the following findings of fact are made:

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the af-

fairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

130 3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herrin funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as City Treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safe-keeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the president being out of the city by reason of ill-

ness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust
131 Company with the bonds and securities described in paragraph three of the bill, and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as City treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on an average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion. The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as se-
132 curity for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal

savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September, 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

Upon the findings of fact hereinabove specially made the following conclusions of law are made and stated:

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

133 2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the

City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved.

It Is, Therefore, Ordered, Adjudged And Decreed that the bill of complaint herein be and the same is hereby dismissed for want of equity with prejudice to a new action and that the temporary restraining order heretofore entered herein upon motion of plaintiff be and the same is hereby dissolved, and that the defendants recover from the plaintiff their costs herein to be taxed by the Clerk of this Court and that they have execution therefor.

Dated March 28, 1932.

Exception allowed to Plaintiff.

Signed—FRED L. WHAM
District Judge.

134 Endorsed: * * (Caption) * * Decree Filed Mar 28 1932 D. H. Reed, Clerk. Pope & Driemeyer Attorneys and Counsellors at Law 24 North Main Street East St. Louis, Illinois

135 And afterwards, to-wit: on the 12th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Petition for Appeal, which said Petition for Appeal was and is in words and figures, the following, to-wit:

April 12. 136 * * (Caption) * *

To the Honorable Fred L. Wham, Judge of the District Court of the United States, for the Eastern District of Illinois:

The above named plaintiff, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, feeling himself aggrieved by the decree made and entered in this cause on the 28th day of March, A. D. 1932, does hereby pray an appeal and does appeal from said decree to the Circuit Court of Appeals for the Seventh Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, pro-
137 ceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at the City of Chicago, Illinois.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

HOSEN FERRELL
JOHN HAY
Solicitors for Plaintiff.

138 (Endorsed:) * * (Caption) * * Petition Filed Apr 12 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

April 12. 139 And on the same day, to-wit: on the 12th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, and Assignment of Errors, which said Assignment of Errors was and is in words and figures, the following, to-wit:

140 * * (Caption) * *

And now comes Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, plaintiff in the above entitled cause, and in connection with his petition for appeal in this cause, assigns the following errors which plaintiff avers occurred in the trial thereof and in the decree of the

Court in said cause, and upon which he relies to reverse the decree entered in said cause on March 28, 1932, and appearing of record therein:

1. That the Court erred in making the following conclusion of law in its decree:

"1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank."

141 2. The Court erred in making the following conclusion of law in said decree:

"2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction."

3. The Court erred in making the following conclusion of law in said decree:

"3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank."

4. The Court erred in making the following conclusion of law in said decree:

"4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit."

5. The Court erred in making the following conclusion of law in said decree:

"5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved."

6. The Court erred in its said decree by dismissing the bill of complaint in said cause.

7. The Court erred in its said decree by dissolving the temporary restraining order entered in said cause.

142 8. The Court erred in its said decree in rendering judgment in favor of the defendants and against the plaintiff for the costs of the defendants in this suit.

Wherefore, the plaintiff prays that the said decree may be reversed and that the District Court be instructed to enter a decree as prayed for in said bill, or should the Court of Appeals deem it advisable and proper, that said decree be reversed and that the Court of Appeals render a proper decree on the record, etc.

HOSEN FERRELL
JOHN HAY
Solicitors for Plaintiff.

143 (Endorsed:) * * (Caption) * * Assignment of Errors. Filed Apr 12 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

d April 1932.

144 And on the same day, to-wit: on the 12th day of April, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

145 * * (Caption) * *

ORDER OF COURT.

And now on this 12th day of April, A. D. 1932, comes the plaintiff in the above entitled cause and files herein his petition for an appeal to the Circuit Court of Appeals for the Seventh Circuit, sitting in Chicago, Illinois, from the decree of this Court, made and entered in this cause on the 28th day of March, A. D. 1932, and also files herein his assignment of errors.

And it is ordered by the Court that the prayer of said petition be and the same is hereby granted, and the appeal from said decree of this Court to the United States Circuit

Court of Appeals for the Seventh Circuit, sitting in the City of Chicago, Illinois, be and the same is hereby allowed upon said plaintiff giving bond conditioned as required by law in the sum of $1000.00.

Enter.

Signed—FRED L. WHAM
Judge.

Endorsed: * * (Caption) * * Order of Court. Ent. Apr 12—1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

147 And afterwards, to-wit: on the 16th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, an approved Appeal Bond, which said Appeal Bond, was and is in words and figures, the following, to-wit: Filed April 1932.

148 * * (Caption) * *

BOND ON APPEAL.

Know All Men By These Presents, That We, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, as principal, and United States Fidelity & Guaranty Company of the City of Baltimore, and State of Maryland, as surety, are held and firmly bound unto City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, the Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, in the sum of One Thousand ($1,000.00) Dollars, lawful money of the United States, to be paid to them and their respective excutors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals this the 14th day of April, A. D. 1932.

The condition of the above obligation is such that, Whereas, on the 28th day of March, A. D. 1932, in the District Court of the United States for the Eastern District of Illinois, in a suit depending in that Court, wherein Ben Sneeden,

as Receiver of The City National Bank of Herrin, Illinois, was plaintiff, and City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, the Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, were defendants, numbered on the equity docket as 4494, a decree was rendered against the said Ben Sneeden, as Receiver of The City National Bank of
149 Herrin, Illinois, from which said decree said Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois has prayed for and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

Now, Therefore, the condition of this obligation is such that if the above named Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, shall prosecute his appeal to effect and answer all costs, if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Signed—BEN SNEEDEN (Seal)
As Receiver of The City National Bank of Herrin, Illinois.
UNITED STATES FIDELITY & GUARANTY COMPANY (Seal)
By—Signed D. V. BRADSHAW
Its Attorney in fact (Seal)

Approved as to sufficiency in form this 16th day of April, A. D. 1932.

Signed—FRED L. WHAM
District Judge.

State of Illinois, } ss.
County of Williamson. }

I, Chas. G. Kaufman, a Notary Public in and for county aforesaid, do hereby certify that Ben Sneeden personally known to me to be the Receiver of the City National Bank of Herrin, Illinois, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal the 15th day of April, 1932.

Sgd—CHAS. G. KAUFMAN
Notary Public.

(Seal)

My commission expires January 6, 1936.

150 State of Illinois, } ss.
County of Williamson. }

I, Geo. G. Otey, a Notary Public in and for county aforesaid, do hereby certify that D. C. Bradshaw as attorney in fact for the United States Fidelity and Guaranty Company of Baltimore, Maryland, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged he signed, sealed and delivered the said instrument as his free and voluntary act and as the free and voluntary act of said United States Fidelity and Guaranty Company for the uses and purposes therein set forth.

Given under my hand and notarial seal this the 15th day of April, 1932.

Signed—GEO. G. OTEY
Notary Public.

(Seal)

151 POWER OF ATTORNEY.

(Seal) No. 46612.

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint I. A. Palmer, D. C. Bradshaw and M. A. Bradshaw of the City of Herrin, County of Williamson, and State of Illinois to be its true and lawful attorneys in and for the County of Williamson, in the State of Illinois for the following purposes, to wit:

To sign its name as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding brought or pending within the aforesaid County of the said State, or in any judicial action or proceeding over which a United States Court shall exercise jurisdiction.

It being the intention of this Power of Attorney to fully authorize and empower any one of the said I. A. Palmer and the said D. C. Bradshaw and the said M. A. Bradshaw to sign the name of said Company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said Company with the seal of the said Company thereto affixed, and the said Company hereby ratifies and confirms all and whatsoever any one of the said I. A. Palmer and the said D. C. Bradshaw and the said M. A. Bradshaw may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company, pursuant to a resolution of its Board of Directors, duly passed on the 11th day of January, A. D. 1904, (a certified copy of which is hereto annexed, has caused these presents to be sealed with its common and corporate seal, duly attested by its Vice-President and by its Assistant Secretary, this 24th day of June, A. D. 1930.

UNITED STATES FIDELITY AND GUARANTY COMPANY

By—Signed—CHARLES C. CONLON
Vice-President.

" RODOLPHE H. MOTTU
Assistant Secretary.

State of Maryland, } ss.
City of Baltimore, }

On this 24th day of June, A. D. 1930, before me appears Charles C. Conlon, Vice-President of the United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquired, who, being by me duly sworn, says that he is the Vice-President of the United States Fidelity and Guaranty Company; that he knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that he signed said instrument as Vice-President of said Company by like authority. The said Charles C. Conlon further says that he is acquainted with Rodolphe H. Mottu and knows him to be the Assistant Secretary of the United States Fidelity and Guaranty Company; that the signature of the said Rodolphe H. Mottu subscribed to said instrument, is the genu-

ine handwriting of said Rodolphe H. Mottu, and was thereto subscribed by like order of the Board of Directors.

My commission expires the first Monday in May, A. D. 1931.

Signed—HENRY F. KREUTZER
Notary Public.

(Seal)

152 Copy of Resolution.

That Whereas, it is often necessary in order to facilitate the business of the Company in States other than Maryland, and in the Territories and in Provinces of the Dominion of Canada and in the Colony of Newfoundland, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness,

Now, Therefore Be It Resolved, that the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries, be, and they are hereby authorized to appoint one or more persons residing in the States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to sign the name of the Company as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding within any one of the said States or Territories, or Provinces of Canada, or Colony of Newfoundland, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the Company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the Company to all intents and purposes, as if done by its duly authorized officers, and the Company through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, Rodolphe H. Mottu, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the Board of Directors of the said Company at a regular meeting thereof, duly called and held on

the 11th day of January, A. D. 1904, a quorum being present, as the same appears on the records of the Company now in my possession and custody as Assistant Secretary.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of Baltimore, Maryland, this 24th day of June, A. D. 1930.

Signed—RODOLPHE H. MOTTU
(Seal) *Assistant Secretary.*

Endorsed: 46612 (Seal) Judicial Power of Attorney From United States Fidelity and Guaranty Company to I. A. Palmer, et al. Herrin, Illinois 6-24-30.

153 Endorsement: E-4494 Appeal Bond Approved & Filed April 16—1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

April 14. 154 And theretofore, to-wit: on the 14th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Praecipe for Record, which said Praecipe for Record, was and is in words and figures, the following, to-wit:

155 * * * (Caption) * * *

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the District Court:

You will please transmit under your hand and the seal of the District Court to the United States Circuit Court of Appeals For the Seventh Circuit, a true copy:

1. Of all of the pleadings filed in this cause by either party thereto;
2. Of the stipulation of facts upon which this cause was tried by the Court;
3. All of the orders entered by the District Court in this cause, including the decree of the District Court and the order allowing an appeal therefrom, and the findings of fact and conclusions of law made by the Court in this cause;
4. Of the opinion of the Court filed in this cause;
5. Of the petition for appeal;
6. Of the assignment of errors and notice of appeal;

7. Of the Appeal Bond;
8. Of this praecipe for record;
9. Of the citation.

Dated April 14, 1932.

BEN SNEEDEN,
As Receiver of the City National Bank of Herrin, Illinois
HOSEA V. FERRELL and
By (Signed) JOHN HAY
His Attorneys.

Received a copy of the above and foregoing praecipe
156 this 14th day of April, 1932, and each of the defendants in the above entitled cause do hereby waive notice of the presentation to the Court of a petition for appeal from the decree of the Court in this cause and further waive all time provided by the rules of the United States Circuit Court of Appeals for the Seventh Circuit within which to file with the Clerk of the District Court a praecipe for any additional matters desired by them to be certified to the United States Circuit Court of Appeals, it being understood that the praecipe of plaintiff hereinabove written requires and that the Clerk shall transmit to the United States Circuit Court of Appeals, a full and complete transcript of all matters relating to said case and of record or on file in said District Court.

Dated April 14th, 1932.

CITY OF MARION, ILLINOIS, a Municipal Corporation,
CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation,
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and
RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,
By (Signed) MAYER, MEYER, AUSTRIAN AND PLATT
" POPE AND DRIEMEYER
Their Attorneys.

Endorsed: #4494 In District Court Eastern District of Illinois Ben Sneeden, as Receiver, etc. vs. City of Marion, Ills. Praecipe for Transcript Filed Apr. 14 1932 D. H. Reed, Clerk.

157 United States of America
Eastern District of Illinois } ss:

I, D. H. Reed, Clerk of the United States District Court in and or the Eastern District of Illinois, do hereby certify that the annexed and foregoing is a true and complete transcript of the files and proceedings, in the case of Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois --vs- City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation, the Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, in Equity No. 4494, as fully as the same appears from the originals now on file and of record in my office as Clerk of said Court, and made in accordance with the Praecipe for Record filed in said Cause, and I further Certify that the Citation and return of service thereon incorporated in said record, is the original Citation with return of service, filed in said cause.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at East St. Louis this 11th day of May, A. D. 1932.

D. H. REED
Clerk.

By V. D. RODGERS
Deputy Clerk.

146 United States of America, } ss:

The President of the United States, To City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation, The Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to Notice of Appeal and Assignment of Errors filed in the Clerk's Office of the District Court of the United States for the Eastern District of Illinois, wherein Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois is appellant and you are Appellees, to show cause, if any there be, why the judgment rendered against the said Appellant as in the said Notice of Appeal and Assignment of Errors mention, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Fred L. Wham, Judge of the District Court of the United States, for the Eastern District of Illinois, this 12th day of April, in the year of our Lord one thousand nine hundred and thirty-two.

FRED L. WHAM
Judge.

Service of the above citation acknowledged this 14th day of April, A. D. 1932.

POPE AND DRIEMEYER
MAYER, MEYER, AUSTRIAN & PLATT
Attorney for Appellees.

(Endorsed) * * (Caption) * * * Citation Returnable May 12th, A. D. 1932. D. H. Reed Clerk. Filed April 15 1932 D. H. Reed, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 83, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of June, 1932, on which the following entitled cause was heard and determined:

Ben Sneeden, as Receiver, Etc.,

Appellant,

vs.

City of Marion, Illinois, *et al.*,

Appellees,

No. 4784, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the sixth day of October, 1931, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-One and of our Independence the One Hundred and Fifty-Sixth.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois
4784 *vs.*
City of Marion, Illinois, Continental Illinois Bank and Trust Company, The Fidelity and Casualty Company of New York, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois.

Appeal from the District Court of the United States for the Eastern District of Illinois.

And on, to-wit: On the thirteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, Continental Illinois Bank and Trust Company, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term 1931.

Ben Sneeden, as Receiver, etc.,

vs.

City of Marion, Illinois, *et al.*

The Clerk will enter my appearance as counsel for the appellee:—Continental Illinois Bank and Trust Company.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
1385—231 S. LaSalle St.,
Chicago, Illinois.

Endorsed: Filed May 13, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, City of Marion, *et al.*, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, Illinois, *et al.*

The Clerk will enter my appearance as counsel for the appellee, City of Marion, *et al.*

C. E. POPE,
H. F. DRIEMEYER,
24 North Main St.,
E. St. Louis, Ill.

Endorsed: Filed May 14, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: One the sixteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, *et al.*

The Clerk will enter my appearance as counsel for the appellant.

HOSEA V. FERRELL,
JOHN HAY,
Marion, Illinois.

Endorsed: Filed May 16, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court a Notice of Motion and Affidavit of Service, which said Notice and Affidavit are in the words and figures following, to-wit:

United States of America. } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

NOTICE.

To: Hon. Hosea V. Ferrell,
Hon. John Hay,
Marion, Illinois,
Counsel for Appellant;

Hon. Carl Meyer,
Hon. Richard Mayer,
Hon. David F. Rosenthal,
231 S. La Salle St., Chicago, Ill.,
Hon. C. E. Pope,
Hon. H. F. Driemeyer,
East St. Louis, Illinois,
Counsel for Appellees.

Please Take Notice that on Tuesday, the 19th day of July, A. D. 1932, at 10 o'clock in the forenoon (Chicago Daylight Saving Time) before the United States Circuit Court of Appeals, or before such of the judges of said court as shall then be sitting at chambers, being Room No. 752, Federal Building, Chicago, Illinois, the undersigned will move for leave to appear in the above cause as amicus curiae and for leave to file a brief therein, at which time and place you may appear if you see fit. Said motion is supported by the affidavit and suggestions attached thereto, copy of which motion, affidavit and suggestions is handed you herewith.

LELAND K. NEEVES.

Of Counsel:
SCOTT MACLEISH & FALK.

Received a copy of the foregoing notice this ..... day of July, A. D. 1932.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

State of Illinois, County of Cook. } ss.

JOHN F. McCARTHY being first duly sworn upon oath, deposes and says that he mailed a copy of the attached notice, motion, affidavit and suggestions upon the within named Hon. Hosea V. Ferrell, Hon. John Hay, Hon. Carl Meyer, Hon. Richard Mayer, Hon. David F. Rosenthal, Hon. C. E. Pope and Hon. H. F. Driemeyer, on this 13th day of July, A. D. 1932, by depositing the same in the United States mails on said date, postage prepaid, and duly addressed to them at the following addresses:

Hon. Hosea V. Ferrell, Marion, Illinois;
Hon. John Hay, Marion, Illinois;
Hon. Carl Meyer, 231 S. LaSalle St., Chicago, Ill.;
Hon. Richard Mayer, 231 S. La Salle St., Chicago, Ill.;
Hon. David F. Rosenthal, 231 S. La Salle St., Chicago, Ill.;
Hon. C. E. Pope, East St. Louis, Illinois;
Hon. H. F. Driemeyer, East St. Louis, Illinois.

Further affiant saith not.

JOHN F. McCARTHY.

Subscribed and Sworn to before me this 13th day of July, 1932.

BLANCHE E. NOVAK,
Notary Public.

(Seal)

And on the same day, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court a motion for leave to appear as Amicus Curiae, affidavit of Leland K. Neeves, and suggestions in support of motion, which said motion, affidavit and suggestions are in the words and figures following, to-wit:

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois, *Appellant,*

vs.

City of Marion, Illinois, a Municipal Corporation, *et al.*, *Appellees.*

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

And now comes Leland K. Neeves, an attorney of the bar of this court, and respectfully moves for leave to appear in the above cause as amicus curiae and for leave to file a brief therein. Said motion is supported by the suggestions and affidavit attached hereto.

LELAND K. NEEVES.

Of Counsel:
SCOTT, MACLEISH & FALK,
134 South La Salle St.,
Chicago, Illinois.

United States of America. } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

LELAND K. NEEVES being first duly sworn upon oath deposes and says that he is a member of the bar of this court, and is a member of the firm of Scott, MacLeish and Falk, attorneys at law, Chicago, Illinois; that said firm is counsel for L. Elmer Hulse, Receiver for Waukegan State Bank, a banking corporation organized under the general banking laws of the State of Illinois, and which bank formerly conducted a banking business in the City of Waukegan, Lake County, Illinois; that on, to-wit, June 18, 1931, the Honorable Oscar Nelson as Auditor of Public Accounts of the State of Illinois, by virtue of the authority vested in him by the statutes of the State of Illinois, took possession of the Waukegan State Bank and said bank did not thereafter continue its said banking business, but on the contrary, said bank is now in process of liquidation.

That under date of March 31, 1931, New York Indemnity Company, a New York corporation authorized and licensed to do business in the State of Illinois, executed a certain depositary bond for the purpose, among others, of securing to one Jay B. Morse as County Treasurer of Lake County, Illinois, the obligee named in said bond, the payment of all de-

dopsits made by the said Morse as such County Collector, subject, however, to all of the terms and conditions of said bond, and that said bond was also executed in the name of said Waukegan State Bank as the principal named in said bond, said bond being executed in the name of said bank by one Norman O. Geyer as President of said bank.

That at or about the same time the said New York Indemnity Company entered into a certain depositary agreement with Chicago Trust Company, an Illinois corporation, which said depositary agreement was also executed in the name of said Waukegan State Bank by the said Norman O. Geyer as President thereof, under which said agreement certain United States Liberty Bonds in the aggregate face value of, to-wit, Two Hundred Thousand Dollars ($200,000) were deposited with said Chicago Trust Company for the purpose, among other things, of indemnifying said New York Indemnity Company against any and all liability which said New York Indemnity Company might have or should thereafter incur by reason of its execution of said depositary bond aforesaid.

That at the time of the closing of said Waukegan State Bank, on, to-wit, June 18, 1931, there was on deposit to the credit of said County Treasurer of Lake County, the sum of approximately One Hundred Sixty-six Thousand Dollars ($166,000), and in addition thereto, said County Treasurer held certain Cashiers Checks issued by said Waukegan State Bank, in the aggregate sum of, to-wit, more than Two Hundred Thousand Dollars ($200,000), and that thereafter said County Treasurer by demand made upon said New York Indemnity Company claimed a right of recovery from said New York Indemnity Company under the said depositary bond of the whole amount of sad deposits and said Cashiers Checks.

That after the closing of said Waukegan State Bank by the said State Auditor of Public Accounts of the State of Illinois, the said Auditor appointed one Fred B. Whitney as Receiver of said bank, and that the appointment of said Whitney as Receiver was thereafter duly confirmed by the Circuit Court of Lake County, Illinois.

That shortly before the closing of said Waukegan State Bank, the said Chicago Trust Company consolidated with Central Trust Company of Illinois, said consolidated corporation being known as Central Republic Bank and Trust Company, and that said Central Republic Bank and Trust Company thereupon took possession of and it still has in its possession and control the said Two Hundred Thousand Dollars

($200,000) of Liberty Bonds so deposited with said Chicago Trust Company under the said depositary agreement.

That some time shortly after the appointment of said Whitney as Receiver aforesaid, the said Whitney as such Receiver made a demand upon the said Central Republic Bank and Trust Company for the return to the said Receiver of the said Liberty Bonds, which said demand was then and there refused.

That shortly thereafter, the said New York Indemnity Company filed its bill of complaint in the District Court for the Eastern District of Illinois, Eastern Division, against the said Jay B. Morse as County Collector aforesaid and against the said Waukegan State Bank and said Fred B. Whitney as Receiver aforesaid, for the purpose, among other things, of having applied to the claim of the said County Treasurer against said Waukegan State Bank and against said New York Indemnity Company, the said Two Hundred Thousand Dollars ($200,000) of Liberty Bonds, or so much thereof as might be necessary and for other relief.

That the said Fred B. Whitney as Receiver aforesaid thereafter filed his answer and counterclaim in said proceeding, wherein and whereby, among other things, he denied the authority, right and power of said Waukegan State Bank to enter into said depositary agreement or to execute said depositary bond, and demanded the return of said Liberty Bonds from the said Central Republic Bank and Trust Company and for such other relief as might be proper.

That thereafter, by orders duly made and entered in the said receivership in the Circuit Court of Lake County, the Honorable L. Elmer Hulse was appointed Receiver of said Waukegan State Bank in the place and stead of the said Fred B. Whitney.

That said proceeding so instituted by said New York Indemnity Company is now pending in the said District Court undetermined.

That it is contended in the foregoing cause, by and on behalf of the appellant herein, that the said City National Bank of Herrin, Illinois had no authority, either under the federal statutes or under the law of the State of Illinois, to pledge any part of its assets to secure, either directly or indirectly, the repayment of deposits of public funds; that said purported pledge and deposit of assets was void and of no effect as against said bank, and that appellant as Receiver was entitled to the return thereof.

That the Honorable District Court in its decision in this

cause, decided that said City National Bank of Herrin, Illinois had power and authority under the federal law and independently of the law of the State of Illinois, and also that it had like power and authority under the law of the State of Illinois (certain federal statutes in terms conferring upon national banks the same power to secure deposits of public funds as is conferred upon state banks under the state law.

That the determination of the issues so presented in this cause will have a direct effect upon the rights of the said Receiver of said Waukegan State Bank with respect to the said Liberty Bonds so held by the Central Republic Bank and Trust Company, and if this Honorable Court in this appeal determines the question of the power of a state bank under the law of Illinois so to pledge its assets to secure deposits, its decision unless modified by the United States Supreme Court will have a controlling effect upon the issues raised in the proceeding so brought by the said New York Indemnity Company.

And affiant further saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 13th day of July, A. D. 1932.

BLANCHE E. NOVAK,
Notary Public.

(Seal)

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

SUGGESTIONS.

As shown in the foregoing affidavit, the present appeal involves the issue as to the power of a state bank in Illinois

to pledge its assets, either directly or indirectly, to secure the repayment of deposits of public funds. The Honorable Fred L. Wham in the court below sustained the right of the City National Bank of Herrin, Illinois to pledge its assets to secure public deposits—first, upon the ground that the federal law, apart from state law, conferred such power upon national banks, and second, upon the ground that the federal statute gives to national banks the same power with respect to pledging its assets to secure public deposits as the local state law confers upon local state banks, and Illinois state banks have such power under the law of Illinois.

If this honorable court passes upon the second ground, such decision will be controlling on the same point in the proceedings brought by the New York Indemnity Company, and if this honorable court passes upon the first ground, the decision will have a direct and immediate bearing upon the determination of the question as to the power of a state bank.

Upon the general question as to the right of a bank to pledge its assets to secure the repayment of deposits, either public or private, there is a direct and irreconcilable conflict in the authorities. Many of the decisions are dependent upon local statutes and in Illinois the question is affected by the provision of the Illinois Constitution of 1870 that no Act authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same and be approved by all the votes cast at such election for or against such law.

This honorable court knows that hundreds of Illinois banks are now closed and in process of liquidation. The question in issue, therefore, we submit, is of large importance in the State of Illinois and should be decided only after a most careful and painstaking review of the authorities.

We are asking, therefore, that this honorable court permit us to intervene in this cause as amicus curiae and present a review of the authorities upon the issue involved.

Respectfully submitted,

LELAND K. NEEVES.

And on the same day, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court an appearance of Amicus Curiae, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4874. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, *et al.*

The Clerk will enter my appearance as Amicus Curiae.

LELAND K. NEEVES,
134 S. La Salle St.,
Chicago, Ill.

Endorsed: Filed July 19, 1932, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the nineteenth day of July, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 19, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuer, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

4784	Ben Sneeden, as Receiver, etc., *vs.* City of Marion, *et al.*	Appeal from the District Court of the United States for the Eastern District of Illinois.

On motion of Mr. Leland K. Neeves, leave is hereby granted him to appear and file a brief in this cause as amicus curiae on or before August 8, 1932.

4784	Ben Sneeden, as Receiver, etc., *vs.* City of Marion, *et al.*	Appeal from the District Court of the United States for the Eastern District of Illinois.

It is now here ordered that the time for filing brief for appellee in this cause be, and the same is hereby extended to and including September 1, 1932.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United State Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the Year of our Lord One Thousand Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

And afterwards, to-wit: On the fourth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday October 4, 1932.

Court opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshall.

Ben Sneeden, as Receiver, etc.
4784 *vs.*
City of Marion Illinois, *et al.*
} Appeal from the District Court of the United States for the Eastern District of Illinois.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on November 4, 1932.

And afterwards, to-wit: On the fourth day of November, 1932, the following further proceedings were had and entered of record, to-wit:

Friday, November 4, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ben Sneeden, as Receiver, etc.,
4784 *vs.*
City of Marion, *et al.*
} Appeal from the District Court of the United States for the Eastern District of Illinois.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and

briefs of counsel and on oral arguments by Mr. Hosea V. Ferrell, counsel for appellant, and by Mr. Richard Mayer and Mr. H. F. Driemeyer, counsel for appellees, and by Mr. Leland K. Neeves, as Amicus Curiae, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fifth day of April, 1933, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. OCTOBER TERM, 1932, JANUARY SESSION, 1933.

BEN SNEEDEN, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,

vs.

CITY OF MARION, ILLINOIS, CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,
Appellees.

} Appeal from the District Court of the United States for the Eastern District of Illinois.

April 25, 1933.

Before ALSCHULER and SPARKS, *Circuit Judges,* and LINDLEY, *District Judge.*

By this action appellant seeks to invalidate a pledge made by the City National Bank of Herrin, Illinois, hereinafter referred to as the Bank, of certain of its assets as security for deposits of the public funds of the City of Marion, Illinois, and to recover the securities pledged. It was tried

upon an agreed statement of facts, and the court dismissed the bill for want of equity.

The pertinent facts are as follows:

The City of Marion had adopted, and during all the times in controversy was operating under, what is commonly known as the "Commission Form of Government," by authority of the Illinois statute. Appellee Carroll, as treasurer of that city, was required to give bond to the city. Cahill's Illinois Statutes, 1931, ch. 24, par. 380. An arrangement was made whereby appellee Fidelity and Casualty Company of New York agreed to execute that bond, and Carroll, in turn, agreed to and did deposit the public moneys of the City of Marion in the Bank, pursuant to an agreement made with it and the Casualty Company whereby certain of the Bank's assets were deposited in escrow with appellee Continental Illinois Bank and Trust Company as security for the repayment of the moneys deposited.

Thereafter the Bank became insolvent, and appellant was appointed receiver. It failed on October 31, 1931, and at that time there was on deposit in it $16,430 of the public funds of the City of Marion.

On November 11, 1931, appellant notified appellees, except Carroll, that he disaffirmed and repudiated the said deposit of securities and the agreement in relation thereto, and demanded that said securities be delivered to him.

It is conceded that the pledge of the assets referred to was authorized by the board of directors of the Bank and was ratified by the board after the pledge was made, and that there is no question concerning the sound financial condition of the Bank at the time the pledge was made.

SPARKS, *Circuit Judge.* The questions presented are: (1) Whether the pledge of securities was within the powers of the Bank and therefore valid; and (2) assuming the pledge to be invalid for lack of power, whether the receiver may recover the securities so pledged.

The courts in this country are not in accord as to whether national or state banks may pledge their assets as security for deposits of public or private money. This diversity of opinion has arisen by reason of the difference of state statutes, and a contrariety of economic views in applying the Federal statute and in formulating state policies.

National banks have only such powers as are given by statute. Their general powers which are applicable to the question before us are to be found in the Act of 1864, as

amended, clause 7, par. 8, ch. 106, 13 Stat. 101; R. S. 5136; 12 USCA Sec. 24, clause seventh, and are as follows:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits;* * *." (Our italics.)

Under the amended Act of June 25, 1930, ch. 604, 46 Stat. 809, 12 USCA Sec. 90 (1932 Supp.), which relates to depositories of public moneys and financial agents of the Government, it is provided that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The National Banking Act of 1864 did not expressly give the power to pledge a bank's assets to secure deposits, and if it were thereby granted it was by virtue of an implied power contained in the clause "all such incidental powers as shall be necessary to carry on the business of banking; * * by receiving deposits; * *," *supra.* Since 1864 it seems that Congress has assumed the right of national banks to pledge their assets to secure deposits of certain public funds.[1] Appellant, however, contends that those statutes grant additional powers to national banks relative to the respective funds referred to. This position cannot be maintained because each of the acts, except the one relating to land bank and joint stock land bank deposits, provides for deposits in state as well as in national banks, and of course Congress did not intend to enlarge the powers of state banks. Hence we conclude that in enacting those statutes Congress did not intend to create additional power for national banks in the respect mentioned, but incidentally recognized a power which it thought already existed under a former statute.

Those enactments, however, are not decisive of the ques-

[1] As to receivership moneys, 39 Stat. 121, 12 USCA 192; as to making land and joint stock banks depositories, 39 Stat. 365, 12 USCA 701; as to postal service funds, 39 Stat. 159, 39 USCA 759; as to depositories of public moneys, 45 Stat. 492, 12 USCA 332 (1932 Supp.); as to Indian moneys, 36 Stat. 1070, 25 USCA 156 and 40 Stat. 591, 25 USCA 162; as to the deposit of moneys received from the sale of United States bonds, 40 Stat. 504, 31 USCA 771.

tion before us, and they are indirectly pertinent only as they may bear upon the intention of Congress in passing the amended Act of June 25, 1930, which grants power to national banks to give the same kind of security for the safe-keeping and prompt payment of deposits of the public money of a state or any political subdivision thereof as is authorized by the law of the state in which such bank is located. The 1930 enactment, therefore, narrows the present confroversy to a construction of the law of Illinois relative to the authority, if any, granted by that state to its own banks to secure, by pledge of their assets, public moneys deposited by the treasurer of an Illinois city which is operating under the commission form of government.

The Federal courts have consistently held that the right of priority in the payment of debts due to the government is not an attribute of sovereignty but depends upon the Acts of Congress. *United States* v. *State Bank of North Carolina,* 6 Pet. 29; *United States* v. *State of Oklahoma,* 261 U. S. 253; *Mellon* v. *Michigan Trust Co.,* 271 U. S. 236; *Liberty Mutual Ins. Co.* v. *Johnson Shipyards Corp.,* 6 Fed. (2d) 752; *United States* v. *Middle States Oil Corp.,* 18 Fed. (2d) 231. We know of no state which has held otherwise, and that principle is not here controverted.

Illinois corporations have only such powers as the laws of that state have given them. Those powers may be either express or implied, and the latter class is limited to those powers which are reasonably necessary to carry out those of the former class. *People* v. *Chicago Gas Trust Co.,* 130 Ill. 268; *Calumet etc. Dock Co.* v. *Conkling,* 273 Ill. 318. In this respect banks are no different from any other corporations. If therefore the appellees in the instant case are permitted to prevail it must be on the theory that express statutory power is given by the State of Illinois to pledge assets of the bank as security for deposits; or that such power arises by implication out of the express power granted by the charter to receive deposits. The fact that Federal statutes have impliedly recognized such a procedure in certain instances relative to national banks, does not answer the question now before us, because the only Federal statute here pertinent provides in effect that national banks in Illinois shall not be permitted to guaranty their deposits by a pledge of their assets unless that right is authorized by the law of Illinois in the case of other banking institutions in that State. It must be conceded that Illinois has not expressly granted such right, and if it exists it must be by implication.

Ward v. *Johnson,* 95 Ill. 215, a case decided in 1880, is relied upon by appellees as holding that such implied right exists in that jurisdiction. In that case the bank had been organized under a special charter which, so far as the record discloses, gave no express power to the bank to pledge assets for the security of deposits. After it had engaged in the general banking business for some time it created an "investment department." This was not done by creating a new corporation or a new agency; it was done by merely giving a new name to a branch of business clearly within the original corporate power. Pursuant thereto it segregated and placed in the hands of a trustee for that purpose, a certain amount of mortgage notes which the bank had received as security from those to whom it had loaned money, and upon which loans the bank was receiving annual interest at the rate of ten percent. Using this trust fund as a basis, the bank thereupon issued its investment certificates upon which it guaranteed annual interest at the rate of 7.3 percent, payable quarterly. These certificates, after sale or transfer, were exchangeable for other like certificates in the trustee's hands, or they were redeemable in currency, in the order of their presentation, out of the funds in the hands of the trustee, or which might next come to his hands from the collection of the notes and securities pledged for the redemption thereof. The purchasing of these certificates was open alike to all, including the depositors of the bank. Some general depositors of the bank purchased certain of the certificates, for which they paid by transferring a corresponding amount of their general deposits to the investment department. Others purchased certificates of investment who were not then and had never been depositors of the bank. The bank became insolvent, and the question arose whether the securities assigned to the trustee were held primarily for the protection of the certificate holders, or were available for payment of demands of depositors generally. The court held that the pledge was valid and that the securities were held by the trustee primarily for the protection of the certificate holders. That decision has been cited in many other jurisdictions as holding that Illinois state banks may pledge their assets to secure general deposits, but we think that question was neither raised nor decided in the Ward case. After enumerating the express powers of the corporation, which includes the power to receive money on deposit, the court said, (at page 237):

> "In addition to these express powers there can be no doubt that such corporations possess, also, the implied power to borrow money. Morse on Banks and Banking, 4; *Planters' Bank* v. *Sharp*, 6 Howard (U. S.) 323; *Curtis* v. *Leavitt*, 15 N. Y. 52-3; Brice on Ultra Vires, 122 (Seward's Ed. 109).
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> "It will not, therefore, be important to determine whether the certificate holders, claiming under the trust deed, are to be regarded as having made deposits or loans for which their certificates were obtained, for in the one case (that of receiving deposits) the requisite power is expressly given to the corporation by its charter, and in the other case (that of borrowing money) it possesses the power by necessary implication. Nor can the right of the corporation to assign or mortgage negotiable instruments which it is authorized to take be questioned. *McIntyre* v. *Preston*, 5 Gilm. 48; *Planters' Bank* v. *Sharp*, *supra*."

It is quite obvious that in using the first two sentences just quoted the Court was discussing the power of the corporation to receive money either by loan or deposit. The last sentence of the quotation of course refers to the bank's general powers to assign or mortgage negotiable instruments which it is authorized to take, whenever it is necessary and proper as an incident to the conduct of its business. The McIntyre case cited in support of the last proposition was an Illinois decision which merely held that an insurance corporation had the power to take a note and to negotiate it in the transaction of its ordinary business. There was no question presented relative to the preference of policy holders or depositors, and no bank was interested in the controversy. In the Planters' Bank case which was also cited, the Court held a Mississippi statute which made it unlawful for any bank within that state to transfer by endorsement or otherwise any note, bill receivable, or other evidence of debt, unconstitutional. That case cited as authority the opinion of Chief Justice Marshall in *United States* v. *Robertson*, 30 U. S. 641, in which case it was assumed without citation of authority that the United States had a right to be secured for a deposit of public funds. In the Robertson case, the Court and counsel, in construing a bond which pledged the entire assets of the bank to secure the deposits of a customs officer, ignored any question of its possible invalidity, although that question constituted the basis for a very strong dissenting

opinion by Mr. Justice Baldwin, in which he called attention to the fact that the point was neither raised by counsel nor noticed in the opinion of the court. The fact that the right of the United States to be secured for the deposit of public funds was assumed by the court and counsel, was in all probability due to the Act of Congress of March, 1797, (ch. 20, sec. 5, 1 Stat. 515, R. S. 3466, 31 USCA Sec. 191), then in force, which established priority of the United States in any claims which it might have against insolvent persons or estates.

Up to this point the Ward case merely premised three elemental propositions upon which it based its conclusions: (1) The bank had express power to receive deposits, (2) it had implied power to borrow money, and (3) as an incident to its business, it had implied general power to assign or mortgage negotiable instruments which it was authorized to take and which it had taken in the general course of its business. The Court then concluded upon the particular facts there presented that the assets of the bank which had been delivered to the trustee constituted a valid pledge of securities for the payment of the certificates of investment to those holding them; and this it did without expressly stating, otherwise than hereafter mentioned, whether the moneys received from the certificate holders constituted loans or deposits. The Court, however, used the following language, (at page 238), "The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. It might execute its bond, note or certificate as evidence of the indebtedness, and secure the same by pledge or chattel mortgage, or note, securities, etc., or by real estate mortgage or trust deed, just as should be mutually agreed. And there has been no reason suggested, and we can conceive of none, why providing a system for securing loans and deposits generally in a particular way is objectionable, when it would not be objectionable to conduct a single transaction in that way." This language of the Court is not altogether pertinent to the question presented, for if the money received from certificate holders constituted loans, then the right of the bank to pledge its assets to secure some of its general depositors to the exclusion of others was not before the Court, and in that event whatever the Court said about the right to pledge assets for the security of deposits was beside the question and must be considered as dictum. The mere fact that the Court failed to characterize the moneys thus received either as loans or deposits does not render such language less ob-

jectionable if in fact such moneys were loans. That they did constitute loans we think there can be no question, and as such it may be conceded that the bank had a right to pledge its assets for their payment. It is not contended that they were general or trust deposits, and they had very few characteristics, if any, of limited time deposits, for payment of the certificates in currency could be demanded only in the order of their presentation and only from funds in the hands of the trustee or which might next come to his hands from the collection of the notes and securities pledged for the redemption thereof. The certificates were characterized on their face as investments, and interest thereon was guaranteed by the bank.

Regardless of the Court's statement that it was unnecessary to decide whether the money transactions between the bank and the certificate holders constituted loans or deposits, it is quite obvious that the Court and counsel considered them as loans and so treated them. This fact is quite clearly established by the first sentence of the opinion, "The principal question arising upon this record is, did 'The Merchants, Farmers and Mechanics' Savings Bank' have power to borrow money and issue 'investment certificates' therefor, secured by trust deed, as was here done?" Under those circumstances we are convinced that the moneys paid by the certificate holders for the investment certificates constituted loans to the bank, and were not deposits within the ordinary meaning of that word. Hence, it cannot be said that by the Ward case Illinois has authorized its banks to pledge their assets as security for the payment of certain general depositors, nor has any other Illinois case been brought to our attention which authorizes such procedure. The question therefore comes to us without helpful precedent from that State.

Much has been said by counsel as to the necessity of such procedure and the reasonableness thereof, but it is quite obvious to us that it is neither necessitous nor reasonable. The necessity urged is based upon competition among banks in their ever growing desire to obtain deposits. The employment of such means for that purpose seems to us to be wholly unworthy of, and inconsistent with, the object for which banks are organized, and it is by no means certain from this record that the demand for such procedure is general in its extent, or that it is not actuated by certain depositors rather than by the banks. The apparent necessity arises out of the wrongful practice, and if all banks be prevented from making use of

the practice the result will be the same to all. We are not convinced that such prevention will result in a depletion of deposits for any appreciable length of time, for the risk and inconvenience of personally caring for one's own money, especially if the amount is considerable, is greater than most people desire to assume, and it is fair to say that it is only deposits of sizable proportion that are thus sought to be secured. But whatever value may be ascribed to the method as a means of increasing deposits, that value is far outweighed by the evil results which are more than likely to follow. We are convinced that such power is not reasonably necessary to the carrying out of the express statutory powers which have been granted to national banks, or to state banks in Illinois.

It is argued that inasmuch as a bank may pledge its bills receivable to secure *loans*, by analogy the power to secure a *deposit* in like manner exists. That argument is based upon the premise that there is no real difference between a deposit and a loan, and that in either case the relation of debtor and creditor arises. It is true that there are certain characteristics which are common to each, but we think the later and better reasoned opinions hold that there is a vast difference. To define that difference with exactness would indeed be difficult, and for the purposes of this case it is quite unnecessary to do so. It is sufficient to say that the difference has always been recognized by the bankers both in theory and in practice, and their method of bookkeeping and their published reports fail to reveal any basis for an analogy. The United States government and the various states, including Illinois, recognize the difference as shown by the reports which they require to be published. Congress and the various legislatures have recognized the difference over a period of many years by making it a criminal offense for an insolvent bank to receive *deposits*. This has been done obviously for the purpose of protecting depositors; while on the other hand the overwhelming weight of authority is that a bank has the power to borrow money to meet an emergency or an exigency, such as threatened or temporary insolvency. See *Divide County v. Baird*, 55 N. D. 45, 212 N. W. 236.

It is well to bear in mind that the business of banking is so intimately connected with the public interest that Congress and the legislatures may prohibit it altogether, or may prescribe the conditions under which it may be carried on. In the exercise of that legislative power there is manifested in

all the legislation bearing on American banking a disposition to throw every possible safeguard around the rights and interests of general depositors, and to treat them all fairly, equitably, and impartially. The doctrine of the guaranty of all bank deposits has its advocates and also its opponents, but we have yet to hear of any voluntary public advocacy of guaranteeing a part of the general depositors to the exclusion of others, and securing that guaranty by a pledge of the bank's assets. Legislation looking to that end we apprehend would be quite as unpopular as it would be for a bank publicly to advertise the fact that it was indulging in the practice under the guise of an implied incidental power.

It is said however that the general depositor who is not secured is in no wise injured if at the time of the transaction the bank is solvent, because the bank's cash assets are thereby increased by the amount of the deposit. Appellees, however, are not in a position to urge this point, because the value of the securities pledged exceeded the amount of the deposit by several thousands of dollars. To be sure, if the securities pledged retained their value the excess would eventually return to the bank for the benefit of the other depositors; but if they did not retain their value they might never return and the secured depositor would thus participate in a greater proportion of the bank's assets than that to which it would otherwise be entitled. If the value of the pledged assets should fall below the amount of the deposit, the bank, in order to retain the deposit, might be compelled to make additional pledges and thus further deplete the assets to the prejudice of the other depositors.

Another inequitable feature is apparent in case the bank subsequently becomes insolvent, as happened here. In that event if the pledged assets are sufficient to pay the secured deposit, all the expenses of winding up the affairs of the bank are paid out of the unpledged assets and fall upon the unsecured depositors.

A bank's right to pledge its assets as security for some of its general depositors to the exclusion of others has constituted the basis for many legal controversies in this country, and as a result there is a diversity of judicial opinion. That diversity is due not alone to the differences of economic views but also to differences in the statutes involved. In those cases practically every phase of the question has been very ably discussed, and we deem it unnecessary to refer to them except to classify them with relation to the general facts and the

statutes there presented.[2] Appellees contend that the greater weight of authority upholds the pledge. However, a perusal of those decisions discloses that some are based upon statutes which expressly grant the power, and others upon statutes which contain provisions from which power may rightfully be inferred. Since none of those provisions is present in the Illinois statutes, what appears to be a majority of opinions supporting the pledge, in reality is not such a formidable array of authority on the question presented under the Illinois statutes. Some of the cases referred to deal with deposits of public money, and others deal with individual and corporate deposits other than public money, but we think the same principle applies to each. The power to pledge assets for the security of public money can not, under the decisions of our Supreme Court, be based upon any attribute of sovereignty on the part of the pledgee, but such power must be based upon an express or implied legislative grant. In the absence of an express grant of power, no power by implication should be permitted to prevail unless the facts presented render it reasonably necessary that such implication arise in order fully and fairly to effectuate the express powers granted. We are convinced that that condition does not exist here. Such an

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[2] Pledge to secure public funds valid by virtue of state statute: *Williams* v. *Hall*, 30 Ariz. 581, 249 Pac. 755 (1926); *Williams* v. *Earhart*, 34 Ariz. 565, 273 Pac. 728 (1929); **Button* v. *Sanguinetti*, 11 Pac. (2d) 1085, (Ariz. 1932); **Ark. La. Highway Improvement Dist.* v. *Taylor*, 6 S. W. (2d) 533, (Ark. 1928); **McGowen* v. *Edwards*, 48 S. W. (2d) 558, (Ark. 1932); *First Nat. Bank* v. *Foss*, 96 Cal. App. 107, 273 Pac. 1085, (1928); **Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128, (Cal. 1932); **Porter C. Canyon Co. Fire Ins. Co.*, 263 Pac. 632 (Idaho 1928); *Schornick* v. *Butler*, decided by the Supreme Court of Indiana, March 28, 1933. (This decision, however, reverses the decision on the same case originally handed down July 3, 1930, and published in 172 N. E. 181, in which it was held that a statute permitting depositories to pledge certain specified assets in lieu of personal or surety bonds given to secure deposits of public funds did not authorize them to assign or pledge other types of assets to secure the sureties on bonds given to secure the deposits. Since that decision was rendered, the personnel of the Supreme Court of Indiana has changed, and the only member who remains is one who dissented from the original decision.) **City of Louisville* v. *Fidelity & Columbia Trust Co.*, 54 S. W. (2d) 40, (Kentucky 1932. But see also *Comm. Bank and Trust Co.* v. *Cit. Trust Co.*, 156 S. W. 160, a 1913 Kentucky case decided prior to the 1932 statute and the leading one opposed to the granting of the right to pledge.) **Farmers' and Merchants' State Bank* v. *Consolidated School Dist.*, 219 N. W. 163, (Minn. 1928); *US Fidelity and Guaranty Co.* v. *Bassfield*, 148 Miss. 109, 114 So. 26 (1929); *Huntsville Trust Co.* v. *Noel*, 12 S. W. (2d) 751, (Mo. 1928); **Bliss* v. *Pathfinder Irr. Dist.*, 240 N. W. 291 (Neb. 1932); *Snider* v. *Fulton*, ... Ohio ..... (decided by the Court of Appeals of Lucas County, Ohio, Dec. 1932. See also *Ward* v. *Fulton*, 181 N. E. 815, a case decided by the Supreme Court of Ohio in 1932.) **Maryland Casualty Co.* v. *Board of County Com'rs.*, 260 Pac. 1112 (Okla. 1926); *Motherscad* v. *US Fidelity & Guaranty Co.*, 22 Fed. (2d) 644, (8th CCA, Okla. 1927); *City*

implication, viz., that the power to transfer specific assets to secure a general deposit is an incidental power "necessary to carry on the business of banking," is so inconsistent with equity and good conscience and is fraught with such wrongful possibilities that we are not willing to foist it upon the State of Illinois until its legislature or its courts have spoken clearly to that effect. That those bodies have the right if they choose to approve such policy is not denied, but we merely hold that they have not yet done so.

It is argued that inasmuch as money when deposited as a general deposit becomes immediately the property of the bank, and the relation of debtor and creditor thereupon arises, the bank therefore has an inherent right to deal with those deposits in the conduct of its business as it pleases. Personal and property rights are relative terms, and they can be exercised only so far as they do not conflict with the rights of

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of Portland v. *State Bank*, 214 Pac. 813 (Ore. 1923); **Foster* v. *City of Longview*, 26 S. W. (2d) 1059 (Tex. 1930); **Austin* v. *Lamar*, 26 S. W. (2d) 1062 (Tex. 1930); *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498 (CCA, 5th Circuit, 1933); *Pixton* v. *Perry*, 269 Pac. 114 (Utah 1928); **US Fidelity & Guaranty Co.* v. *Anderson*, 264 Pac. 1030 (Wyoming 1928).

* These cases hold variously that while the state involved does have its statute, that statute is to be very strictly construed, and not to be extended beyond its express terms, either as to type of securities to be pledged, or the funds to be protected, etc.

Pledge to secure public funds valid because not prohibited by statute: *Richards* v. *Osceola Bank*, 45 N. W. 294 (Iowa 1892); *Andrews* v. *Odebolt Sav. Bank*, 214 N. W. 559 (Iowa 1929); *French* v. *School Dist.*, 7 S. W. (2d) 415 (Mo. 1928); *Ainsworth* v. *Kruger*, 260 Pac. 1055 (Mont. 1927); *Bliss* v. *Mason*, 237 N. W. 581 (Neb. 1931); *Melaven* v. *Hunker*, 299 Pac. 1075 (N. M. 1931); *Page Trust Co.* v. *Rose*, 135 S. E. 795 (N. C. 1926); *Richmond County* v. *Page Trust Co.*, 142 S. E. 786 (a 1928 N. C. case holding pledge to secure private deposit also valid); *Grigsby* v. *Peoples' Bank*, 11 S. W. (2d) 673 (Tenn. 1929). See also *Citizens State Bank* v. *First Nat. Bank*, 157 Pac. 392, a 1916 Kansas case holding that a statute similar to the one construed in *Hirning* v. *Toohey*, *infra*, has reference only to pledge by bank already insolvent, and does not prevent even private pledge by solvent bank.

Pledge to secure public funds valid in accordance with general practice or public policy: *First American Bank & Trust Co.* v. *Palm Beach*, 117 So. 900 (Fla. 1928); *In re Bank of Spencerport*, 255 N. Y. S. 482 (1932). See also: *McFerson* v. *Nat'l. Surety Co.*, 212 Pac. 489 (Colo. 1923), giving no reason for holding such pledge valid; *State Bank of Commerce of Brockport* v. *Stone*, a case decided by the New York Court of Appeals, Feb. 28, 1933, holding that while a pledge to secure a private deposit is invalid, the receiver of an insolvent bank must return the amount of the deposit before he is entitled to the return of the pledged securities; and *Interstate Nat'l Bank* v. *Ferguson*, 30 Pac. 237 (Kan. 1892).

Pledge of securities invalid: *Carter* v. *Brock*, 110 So. 71 (La. 1926); *Divide County* v. *Baird*, 212 N. W. 236 (N. D. 1926); *Hirning* v. *Toohey*, 207 N. W. 462 (S. D. 1926); *Balt. & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799, a decision by the Circuit Court of Appeals for the Third Circuit holding a pledge to secure a private deposit invalid.

others. Illinois banks by virtue of their charters have power to do general banking business, which includes the right to receive general deposits. To be sure such a bank owns its assets, and that term includes general deposits, but to say that such bank in the conduct of its business has an unrestricted right to use its assets as it pleases is going further, we think, than the law authorizes. Those who become depositors do so as the result of an express or implied invitation from the bank, and although the bank becomes the owner of the money deposited, it will not, in the absence of legislative authorization, be permitted to use it in such manner as to violate a general depositor's right to be treated fairly, equitably and impartially with all other general depositors.

There is another obstacle which we think defeats appellees' right to prevail in this action. In 1910, Illinois enacted what is known as its Commission Form of Government Act. Cahill's Illinois Revised Statutes, 1931, ch. 24, par. 323, *et seq.* Paragraph 374 deals with the deposit by the city treasurer of the city funds in certain banks. It specifically provides that

> "any such bank, before any such deposit is made therein, * * * shall * execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep and account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depository bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank."

That enactment expressly sets forth what an Illinois bank shall be authorized to do in order to secure a deposit of public funds of a city operating under the Illinois commission form of government, and no implication which is not clear will be permitted to strike down that express requirement. If prior to this enactment, as appellees contend, Illinois had committed itself to the policy of permitting assets to be pledged for the security of deposits, that fact would not prevent a change of that policy whenever the lawmaking authorities of Illinois might consider it expedient to make such change, and their reasons for so doing would not be reviewable by the courts.

Even if it be conceded that appellees have properly construed the Court's language in *Ward* v. *Johnson, supra,* then we say that section 51 of the Illinois Commission Form of

Government Act, (par. 374, ch. 24, *supra*) has superseded the doctrine announced by the Court in that case so far as the facts in the instant case are concerned.

We have refrained from discussing the authorities cited from other courts, because they deal with statutes other than, and different from, the Illinois statutes; or they deal with implied powers which we are convinced do not arise in the instant case, or with economic questions which no doubt were considered by the Illinois Legislature when paragraph 374, *supra*, was enacted, and with which we cannot be judicially concerned.

The question next arises whether section 51 of the Commission Form of Government Act has in any way been modified by subsequent legislation. On June 23, 1919, the "General Banking Act" of Illinois was enacted, and it became effective on December 1, 1920. Cahill's Illinois Revised Statutes, 1931, ch. 16(a). In that Act there is no express authority granting banks power to pledge, or prohibiting them from pledging, their assets for the security of deposits; but under the broad general powers therein granted to form banks and banking associations for the purpose of discount and deposit, buying and selling exchange, and doing a general banking business, it is contended by appellees that the same implications as announced in *Ward* v. *Johnson, supra,* continue to prevail, inasmuch as the general banking powers granted in the former enactments are not materially different from those contained in the Act of 1919.

Whether a statute has been repealed by implication is a question of legislative intention, and there are acknowledged rules for ascertaining that intention. Such repeals are not favored, and one statute will not be considered as repealing another statute by implication unless the later statute is positively repugnant to the former or is a plain substitute for it. The intent to repeal must very clearly appear. *United States* v. *Claflin,* 97 U. S. 546. Such repeals will not be indulged if there is any other reasonable construction. *Peck* v. *Elliot,* 79 Fed. 10; *Chicago, etc., R. Co.* v. *Doyle,* 258 Ill. 624. The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later and general act. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487. The presumption is that the special act is intended to remain in force as an exception to the general act. *Rodgers* v.

United States, 185 U. S. 83; *Washington* v. *Miller,* 235 U. S. 422.

Under the circumstances of this case we think there was no intention on the part of the Illinois Legislature to repeal or modify the provisions of paragraph 374, *supra,* by the enactment of the General Banking Act in 1919. The former is a special act and deals with the powers of banks generally. The two are not to be considered as positively repugnant nor offensively inconsistent. It might well be that the Illinois Legislature had good and sufficient reasons for preferring bonds with sureties instead of assets of banks as security for the deposits of cities operating under the commission form of government. This it had a right to do if it so desired, and its reasons therefor cannot be questioned. Subsequent events of which we may fairly take judicial notice may be considered as having somewhat justified that choice.

Appellees urge our consideration of *Williams* v. *Earhart,* 34 Ariz. 565, 273 Pac. 728. In that case the receiver of a bank sued the state treasurer to recover collateral theretofore pledged and delivered by the bank to the treasurer to secure a deposit of public money. The pledge did not consist with the state statute, which provided that a bond with sureties should be given or that a deposit of interest-bearing bonds of the United States should be made with the state treasurer. The state of Arizona was the real beneficiary, and the Court, assuming without deciding that the taking of the pledge was contrary to law, held that the receiver might not repudiate the contract as against the interests of the beneficiary, the State, which was an innocent third party. The Court said:

> "We agree that security of the kind specified in the statute is the only kind the taking of which would exempt the state treasurer from liability on his official bond in case he deposited state money in a designated depository bank, but it by no means necessarily follows that other security, even though it does not exempt the treasurer from liability for the deposit, cannot be used by him for the protection of the latter."

The question before us was not decided by that Court, and the power of a national bank to pledge its assets as security for public funds under a statute similar to the one before us was not in issue. From the quotation above referred to, however, the Court said that the state treasurer still would be liable to the State on his bond because he had not followed the statute, and this means that he would not be released from his bond

because he was not authorized by the statute to do the thing that he did. The Court held, however, that the receiver would not be permitted to repudiate the contract as against the state, an innocent third party. On that phase of the question we do not choose to follow that case, but prefer rather to rely on the reasoning pertinent to that subject in *Baltimore & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799.

Paragraph 374, *supra*, expressly provides that before any Illinois bank may receive a deposit of public funds, of the kind herein described, it shall execute a bond with sureties approved by the president of the city council, as security for the return of the money deposited; and it is not authorized to give, nor is the treasurer authorized to accept, other security. Any other construction would render the statute meaningless. In the present case no bond was given by the Bank, and the assets which were deposited in violation of the statute were neither approved by the president of the council, nor were they deposited with the city treasurer except in escrow and under joint control with the surety on the treasurer's original bond, and by these acts appellees hope to circumvent the express terms of the statute. These things neither the treasurer nor the Bank was authorized to do under the Illinois law and the Federal Act of June 25, 1930, *supra*.

Our attention has been called to *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498. In that case the appellee was organized under a special Act, which among other things, provided that the Treasurer or depository should be governed by the same laws as are provided for depositories of county funds; provided that before any such treasurer or depository should be entitled to receive any funds of the district, it should give bond to the district in amount equal to the funds deposited. Section 517a of the law of Texas relating to depositories of county funds, provided that no bank, or bank and trust company, except where specifically authorized by statute or except in the case of a deposit of public funds, should give preference to any depositor by pledging the assets of the corporation as collateral security. Instead of giving a bond to protect appellee's deposit, part of the bank's assets were pledged. Appellee contended that the statutes should be construed together and that with such construction the pledge was authorized and valid. This contention was sustained and the Court further said that aside from section 517a, ample authority was to be found in the other statutes relied upon, and in the general law. The other stat-

utes referred to were not cited. It will be remembered that the Illinois statutes contain nothing resembling the provisions relied upon in this case.

It may be urged that the equities surrounding the transaction should appeal even to a court of law in arriving at its conclusions on the ground that the pledge was made in good faith and with the approval of the board of directors; but it should also be remembered that the pledge in all probability was made in the absence of and without the knowledge of the unsecured depositors. It is quite obvious that the surety on the treasurer's bond is the moving spirit in this controversy, and it has a perfect right to be. It should neither be criticised nor penalized on account of that fact, but in speaking of equities it should be borne in mind that it voluntarily entered into the contract for which we assume that it received a cash consideration. It voluntarily assumed the risk of accepting a pledge of the assets of an Illinois bank, notwithstanding the fact that that State had granted neither express nor implied power to its banks to make such pledge. Under those conditions we think the surety is in no position to complain.

Appellees' contention that the receiver is without authority to maintain this action is without merit. *Baltimore & O. R. Co.* v. *Smith, supra; Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128; *Austin* v. *Lamar*, 26 S. W. (2d) 1062. The receiver represents more than the insolvent institution. He also represents all the creditors of that insolvent institution. *Davis* v. *Gray*, 83 U. S. 216; *Franklin Nat'l Bank* v. *Whitehead*, 149 Ind. 560. It is true that ordinarily when two parties have entered into a contract which has been fully executed on both sides, one will not be allowed to set up the defense of *ultra vires* without making some sort of restitution. However, in such a case as has arisen here, there are other parties to be considered in addition to the two contracting parties, namely, the general depositors whose rights have been infringed by the action of the two contracting parties. Restitution would simply continue that wrong against innocent parties. Further, as was stated in *Balt. & O. R. Co.* v. *Smith*, and in *Wood* v. *Imp. Irr. Dist., supra*, there were two acts involved in the transaction under consideration, one, the deposit which was perfectly valid, and the other, the pledge which was invalid. It does not appear to us as worthy of judicial approval that the secured depositor may take advantage of the *ultra vires* act of the bank and assert an estoppel grounded upon such act. It had no right in making the deposit to rely upon a prefer-

ence in the form of an unlawful transfer of assets. Otherwise both parties, bound to realize the illegality of the transfer, might, in the face of such unlawfulness, agree to make the transfer, saying each to the other, "though the transfer is not authorized by law, yet we will make it and accomplish the desired result despite its illegality, for neither may hereafter rescind without restoring the original status." We do not approve of the accomplishment of an illegal result by way of any such unconscionable use of the doctrine of estoppel. We hold with the decisions in the cases cited that the receiver may repudiate the invalid pledge without returning the valid deposit, and that appellees must share with the other general depositors in the distribution of the Bank's assets.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ALSCHULER, *Circuit Judge*, dissenting. I do not concur in the holding that there is in Illinois a public policy against permitting banks to pledge assets for securing public deposits unless authorized by a statute. I believe that *Ward* v. *Johnson*, 95 Ill. 215, sufficiently indicates the view of the Supreme Court that public policy in Illinois is not opposed to such pledges. The case has been quite frequently cited in other jurisdictions to support the proposition that in Illinois such pledge of assets is not contrary to the state's public policy.

The recent case of *People ex rel. Nelson* v. *Peoples State Bank of Maywood*, 266 Ill. App. 330, while not in all respects like that at bar, in my judgment recognizes the binding force of such a pledge; and the reviewing decision of the Supreme Court of Illinois, in an opinion filed October 22, 1932, does not conflict therewith. However, upon the petition of both parties a rehearing has been granted, which at present writing is pending.

It is significant that in a state so commercially important as Illinois, where presumably there have been many such transactions not falling within the provisions of any statute, such pledges, if deemed contrary to the state's public policy, have not long since been denounced by its courts.

It is pointed out, in support of such a public policy of the state, that ordinarily there is secrecy in such pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.

It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is a vicious practice to permit banks to advertise their "resources" at an amount inclusive of their total deposits, without requiring that at the same time, and quite as prominently, there be stated the liabilities to which the resources are subject.

It is also pointed out that such pledging of a bank's assets may, in case of the bank's threatened disaster, enable certain depositors to be favored as against others. This, of course, would bring into the picture collusion and probably fraud, which would be dealt with when it appears, but which is not involved here, where concededly there was no suggestion of circumvention or favoritism, and where, at the time of the pledge, the bank was solvent.

But if it may be said that the policy of the state, or even of the United States, is against such pledges, and that the giving of them was *ultra vires* the bank, another proposition arises which in my judgment would in any event require restoration of the deposits, made in good faith upon the ultimate security of the bank's pledge, before the bank or its representative may be permitted to take back the securities. The case of *State Bank, etc.* v. *Stone,* decided by the New York Court of Appeals February 28, 1933, specifically so decides. In that case it is held that, while the bank was without power to pledge assets to secure a "*private deposit,*" the receiver of the insolvent pledgor bank must pay back the amount of the deposit before he is entitled to a return of the pledged securities. In the case at bar it was the good faith deposit of the bank's securities that enabled the city's treasurer to procure a bond to protect the city against loss through any such deposit; and the bank or its receiver should not be permitted to withdraw the securities without making whole the depositor who, upon the faith of the pledge, deposited the funds in the bank. The bank itself could not properly urge its want of power to make the pledge, in support of its undertaking to recall the pledge, without first making good the deposit; and, as fully reasoned in the New York case, the rights of the receiver are not in this regard different from those of the bank itself if there were no receiver.

It is said that this rule would not apply because there is another party to the transaction, namely, the unsecured depositors and creditors of the bank. As to this contention the New York case is like this one, both having as the "third party" the unsecured depositors and creditors. Without further elaboration thereon I refer to that case and its discussion of the proposition.

In this connection I think it should be considered that in a pledge such as this one the bank's assets are not depleted. The deposit of the public funds made on the strength of the pledged assets becomes the property of the bank and gives to the bank, in additional cash assets, the substantial equivalent of the securities pledged.

But the opinion is further based on the conclusion that by the Illinois Commission Form of Government Act the city and its treasurer are disqualified from depositing, and the bank from receiving, deposit of city funds on any other terms than as the act prescribes, and the subsequent act of Congress referring to state laws specifies. This first act specifies that the city treasurer shall make daily deposits of receipts from all sources of revenue in one or more banks *situated in the city,* to be selected by the president of the council, the commissioner of accounts and the treasurer, or by any two of them, and that before deposit is made therein the bank shall be required to enter into an obligation with the said council to pay interest on deposits at a rate of not less than three per cent per annum, and shall execute bond, with sureties approved by the president of the council, conditioned that the bank will safely keep and account for said money.

These provisions prescribe the duties and direct the conduct of the treasurer and other city officers in the matter of depositing money, but in my judgment they are in no sense or degree a limitation upon the right of a bank to pledge its assets as security for deposits. If in making the deposit the treasurer does not comply with the statute, he may remain personally liable to the municipality for the safety of the deposit, but the act does not deny to banks the right further to secure the depositing municipality or its treasurer or his sureties, by pledge of assets, even though all the statutory requirements have been observed.

It is to be noted that only comparatively few Illinois municipalities are under the Commission Form act, and that the policy in Illinois of permitting the pledging of a bank's

assets as security for deposit of public funds continues to be applicable to those municipalities unaffected by the Commission Form act. I cannot conceive that by the Commission Form act it was intended to distinguish between the two classes of municipalities as to the right of banks to pledge their assets to make secure deposits of municipal funds. The act was in regulation of cities, not banks.

I am well satisfied that the general right of an Illinois bank to pledge its assets to secure deposits of public funds was not withdrawn by the Commission Form act, and that Illinois banks had and have the right to pledge their assets to secure deposits of municipalities under Commission Form of government, as well as of other municipalities.

But in the case of the city of Marion it is particularly to be noted that at this time there were no banks whatever in the city, and it was impossible to comply with the statutory mandate of selecting a bank of that city in which to deposit the city's funds. What then was to be done? Must the city and its treasurer assume the risk of thieves and fire and other perils by keeping the funds in physical possession for lack of express statutory authority to select a depositary elsewhere? In the opinion of October 22, 1932, in *People ex rel. Nelson* v. *Peoples State Bank of Maywood, supra,* it is said:

> "There was no necessity for a law or an ordinance authorizing the village treasurer to deposit the funds in his hands in a bank. That was customarily done. * * * We know of no case in this State in which the legality of the deposit of public funds by their custodian in a bank has been questioned. The reason, no doubt, is, that the practice has been universal and has been recognized as necessary."

The situation was one which evidently the statute did not contemplate, and to my mind the statute did not cover such a contingency and is therefore not applicable to this case. If the statute has no application to a situation such as this, the bank's power to pledge its assets to secure the deposit was not affected by it.

But, even if it were concluded that the Commission Form act had the effect of depriving Illinois state banks of the right to pledge their assets to secure deposits made by Commission Form municipalities, I am of opinion that the amended Act of June 25, 1930, 12 U. S. C. sec. 90 (1932

Supp.), was not intended to restrict or limit national banks in their theretofore quite generally recognized right to pledge their assets to secure deposits of public funds. While in many relations such security is specifically required by federal statute, I believe this act is no inhibition upon pledging assets to secure public funds in those instances where there is no such statutory requirement.

In providing by the Act of 1930 that national banks may give such security for the safe-keeping and payment of public funds as is authorized by the law of the state in which the national bank is located in the case of other banking institutions of the state, the national bank was placed upon the same footing in respect to bidding for public deposits as were the state banks, with which, quite naturally, they were in competition. Far from thereby withdrawing from the national bank the power it theretofore had to pledge its assets to secure deposits of public funds, the act was, in my judgment, an enlargement of its power, so that, in addition to a general right to pledge assets to secure such deposits, it thereafter had the right, notwithstanding any prior inhibition upon national banks from doing some or any of the things in that regard which might in some particular state be done by the banks thereof. The act was calculated to remove any doubt of the right of the national banks to be on the same footing as the state banks of the several states. An interesting side light in connection with the passage of this act appears in the margin.[3]

Instead of thereby withdrawing or restricting any right of national banks to pledge their assets to secure deposits of public funds, the act of Congress undertook only to remove

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[3] Referring to this legislation there appears in House Report No. 1657, 71st Congress, 2nd Sess., this letter from Acting Secretary of the Treasury Lowman to Committee Chairman McFadden:

"My dear Mr. Chairman: Reference is made to S. 486, 'An act to amend section 5153 of the Revised Statutes, as amended' which passed the Senate April 1, 1930, and which is now pending before the Committee on Banking and Currency of the House of Representatives.

"While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486."

whatever, if any, possible doubt of such right there might be in any of the states.

We have received copy of an opinion of the Indiana Supreme Court filed March 28, 1933, in *Schornick* v. *Butler*, referred to in note 2 of the opinion herein. The facts there are so like those here, and the discussion is so corroborative of the conclusions stated in this dissent, that I feel justified in commenting thereon.

The appellees, who were directors of a bank, became sureties on the bank's bond to the municipality for public funds which would be deposited in the bank by the municipality. In consideration of becoming sureties, the bank agreed with them that sufficient of its assets should from time to time be set aside and turned over to them as a collateral pledge to insure them against loss upon their bond as sureties. The bank (which the Circuit Court found to have been insolvent at the time the security agreement was made) went into receivership, and action upon the bond was brought by the municipality against the sureties, who thereupon demanded that the agreed collateral be turned over to them. This the receiver of the bank refused to do. Suit was brought by the sureties against the receiver to secure possession of the collateral, and the judgment of the Circuit Court found for the sureties.

The opinion affirming the judgment touches upon several of the propositions I have above considered. The opinion held it to be immaterial whether the assets were pledged directly to the municipality, or to the sureties upon the bond to the municipality for securing the deposit of its funds. It discusses the contention that the pledging of the bank's assets to secure deposits is contrary to public policy, and after some consideration of that question says:

> "We find no constitutional or statutory enactments, no practices of officials or judicial decisions in this state indicating that the pledging of collateral to secure deposits is against public policy. There is nothing inherently wrong or immoral in such a transaction. The only decision of this court upon the subject that we have found upholding such an agreement denies such a policy."

Respecting the equities of such a situation, and as bearing on the proposition that such pledges are *ultra vires* the bank and against public policy, the opinion states:

> "The bank parted with an interest in the securities equal to the deposit subject to the condition that, to the

extent to which it repaid the cash, it would reclaim the securities. It amounts to no more than a sale of securities at their actual value for cash. The general creditors of the bank lost nothing by the transaction, and, if they are affected at all, they are benefited since the bank is more liquid by reason of having the cash rather than the securities. The appellees gained nothing. The public deposit or its proceeds was used, or will be used, for the payment of general creditors of the bank. No more than an equal amount of the pledged notes will be withheld. The action sounds in equity. The general creditors of the bank or the appellant, their representative, cannot be heard to say that the pledging of the securities was illegal while they retained the benefits of the transaction. *Melaven* v. *Hunker, et al.* 299 Pac. 1075. It would be unconscionable to permit the general creditors to profit where they had no loss, at the expense of the appellees, who have profited nothing and have done no wrong. It must not be permitted unless there is some insuperable rule of law which requires it."

The court refers to the public depository law of Indiana, section 12621 (Burns' 1926) which requires banks receiving public deposits to give the municipality a bond to secure the same. Section 12622 provides that in lieu of such bond the bank may pledge specified classes of municipal bonds, or bonds of the United States or of the state of Indiana, to secure such deposits. The securities there agreed to be pledged were not such as the statute authorized a municipality to take, and were not given or to be given to the municipality itself; and so in that case, as in the case at bar, the pledge did not comply with the statute, and to sustain the pledge resort must be had to the general power of a bank to pledge its assets as security for such deposits. As to this the opinion says:

"Our Banking Law gives banks 'all the powers incident and proper, or which may be necessary and usual, in carrying on the business of banking.' The right of a bank to borrow money and pledge its assets for the payment thereof is beyond serious question. It is urged, however, that a deposit is not a loan and that banks have no power to pledge their assets to secure deposits. There is no reason for the distinction. In either case the relation of debtor and creditor is created. It has been expressly

held by this court that an agreement to assign collateral as security for a certificate of deposit will be enforced, and in answer to the contention that the transaction constituted an ordinary deposit and not a loan, the court said:

"'As to how it should be regarded in this respect, whether as a loan or a deposit, is not material under the facts in this case, for if it be considered as an ordinary deposit its effect would be to create the relation of debtor and creditor between appellee and appellant's bank.' *Harris et al.* v. *Randolph County Bank,* 157 Ind. 120.

* * *

"The Legislature recognized the right of a bank to pledge collateral to secure the payment of ordinary deposits when it enacted the depository law. An examination of the title and body of that Act clearly discloses that it was not intended to affect the powers of banks. It merely fixed the terms and conditions upon which public officers may make deposits in banks."

The Indiana statute respecting the general power of banks does not in essence differ from that of Illinois on the same subject. The Schornick opinion recognizes the *power* of banks to make pledge of its securities to secure deposits *of public or private funds;* and the opinion in the Harris case, *supra,* holds that in a private transaction involving an agreement to pledge the bank's assets as security it was immaterial whether the transaction was a loan to the bank or a deposit. Although some cases distinguish as between pledges to secure public and private deposits, and between deposits and loans, I can see no adequate reason for the distinctions. However, in my judgment those distinctions are not material here, where the deposit was of public funds.

The last above quoted paragraph indicates that the public deposit statute of Indiana, in specifying what security for deposits the municipality must require, did not affect the power of the bank to pledge assets, but "merely fixed the terms and conditions upon which public officers may make deposits in banks."

In another place, referring to the contended difference between a deposit and a loan to the bank, and its right to pledge for the latter and not the former, the opinion says:

"The basic contractual obligation to pay is the same and, if when the money is received the bank assigns col-

lateral as a guaranty of its repayment, we know of no rule or reason which would permit the collateral to be retained in one case and not in another.'

The note 2 refers to the unusual circumstance that in a prior opinion in the same case by the same court, filed July 3, 1930, and reported in 172 N. E. 181, conclusions were stated diametrically opposite to those announced in the later opinion. In the first opinion the Circuit Court was reversed; and, petition for rehearing having been granted, in the second judgment was affirmed.

The note also calls attention to the fact that in the interim the personnel of the court had changed, leaving on the bench only one of the five members who participated in the first opinion, and he dissenting therefrom. It is quite true that the first opinion was not unanimous (two dissenting therefrom). The materiality of this is not apparent, beyond indicating the likelihood that in each instance the case had the careful consideration of the court.

Whether tested by the laws and the public policy of the state of Illinois or of the United States, or of both, I believe this pledge of the bank's assets should be sustained; but that, in any event, an order directing return of the securities should be conditioned upon payment of the amount of the deposits to secure which, directly or indirectly, the securities were pledged.

And on the same day, to-wit: On the twenty-fifth day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
4784 *vs.*
City of Marion Illinois, Continental Illinois Bank and Trust Company, The Fidelity and Casualty Company of New York, and Ray Carroll, as Treasurer of the City of Marion, Illinois.

Appeal from the District Court of the United States for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

And afterwards, to-wit: On the fifteenth day of May, 1933, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the twenty-fourth day of May, 1933, there was filed in the office of the Clerk of this court an answer to the petition for rehearing, which said answer is not copied here.

And afterwards, to-wit: On the first day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, June 1, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

4784 Ben Sneeden, etc. *vs.* City of Marion, *et al.* } Appeal from the District Court of the United States for the Eastern District of Illinois.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the third day of June 1933, the mandate of this court issued to the District Court of the United States for the Eastern District of Illinois.

And afterwards, to-wit: On the tenth day of June, 1933, there was filed in the office of the Clerk of this court a Stipulation to recall mandate, which stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1932.

No. 4784

Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois,

Appellant,

—*vs*—

City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation; The Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

STIPULATION.

It is hereby stipulated by and between the parties to the above entitled cause by their respective solicitors that the mandate which was heretofore issued herein may be recalled and stayed herein until the time for filing a petition for certiorari in the Supreme Court herein has expired without such a petition having been filed, or if such a petition be filed, until the same is denied, or if so filed and granted until the case is finally disposed of in the Supreme Court of the United States.

HOSEA V. FERRELL
JOHN HAY
Solicitors for Appellant.

C. E. POPE
H. F. DRIEMEYER
R. T. COOK
CARL MEYER
DAVID F. ROSENTHAL
RICHARD MAYER
Solicitors for Appellees.

June 9th 1933.

And on the same day, to-wit: On the tenth day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Saturday, June 10, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Ben Sneeden, as Receiver, etc.
4784 *vs.*
City of Marion, *et al.*

Appeal from the District Court of the United States for the Eastern District of Illinois.

Now this day comes counsel for appellees and presents a motion for recalling and staying the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby recalled and stayed until the further order of this court.

It is further ordered that counsel for appellees proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 87 to 130, inclusive, contain a true copy of the proceedings had and papers filed, (excepting briefs of counsel, petition for rehearing and answer thereto) in the case of

Ben Sneeden, as Receiver, etc.,
Appellant,

vs.

City of Marion, Illinois, *et al.*,
Appellees.

No. 4784, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following No. 128.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court, U. S.
FILED
AUG 30 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION, AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,

Petitioners,

versus

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
Chicago, Illinois,
C. E. POPE,
H. F. DRIEMEYER,
East St. Louis, Illinois,
R. T. COOK,
Marion, Illinois,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. .....

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION, AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,
Petitioners,

versus

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, reversing the District Court for the Eastern District of Illinois, and holding illegal and void a pledge of assets by the City National Bank of Herrin, Illinois, as security for public moneys of the City of Marion, Illinois.

Questions Presented.

1. Does a National bank have general power to pledge assets as security for deposits of public moneys of states or political subdivisions thereof?

2. Does the amendment of June 25, 1930, to Section 5153 Revised Statutes, limit the power of a national bank to pledge assets as security for deposits of public moneys of a state or political subdivision thereof, to that possessed by state banks in the state in which the national bank is located?

3. Do state banks of Illinois have general power to pledge assets as security for deposits of public moneys of the state or any political subdivision thereof?

Petitioners believe that the first and third questions should be answered in the affirmative and the second in the negative.

Circuit Judge Sparks, in whose opinion in the Circuit Court of Appeals (64 Fed. (2d) 721) District Judge Lindley concurred, expressed doubt as to the power of national banks generally to make a pledge such as is here involved; he held that under the amendment of June 25, 1930, a national bank in Illinois could give security only to the same extent as could Illinois state banks, and that Illinois state banks had no such general power.

Circuit Judge Alschuler dissented; he held, as did Judge Wham of the District Court (58 Fed. (2d) 341), that national banks possessed such power prior to the amendment; that the amendment did not operate as a limitation on powers previously existing; and that Illinois banks do possess such power.

STATUTES INVOLVED.

Federal Statutes.

By Section 8 of the National Bank Act of June 3, 1864, Chap. 106, 13 Stat. 99, 101, it was provided that national banks may

> "make contracts, * * * exercise * * * all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; * * *."

This provision was re-enacted without change in Sec. 5136 of the Revised Statutes and is still in force (12 U. S. C. A. Sec. 24).

By Section 45 of the same National Bank Act of June 3, 1864, 13 Stat. at p. 113, it was provided that the Secretary of the Treasury should require national banks to give

> "satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, * * *."

This provision was reenacted without change in Section 5153 of the Revised Statutes and is still in force (12 U. S. C. A. Sec. 90). There was added to it by the amendatory act of June 25, 1930, Chap. 604, 46 Stat. 809, the following:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Acts of Congress providing for the deposit of various public funds in state as well as national banks, and in Federal Land and Joint Stock Land banks, requiring the official making the deposit to take collateral security from the bank, are referred to in the Appendix (*infra*, pp. 19-21).

Illinois Statutes.

The Constitution of 1870 (Section 5, Article XI) provides that no statute "authorizing or creating corporations * * * with banking powers, whether of issue, deposit or discount, nor amendments thereto" shall become effective without a referendum.

The General Banking Act of 1887 (Laws 1887, p. 89) permitted organization of banks "for purposes of * * * deposit." This provision is continued in the Banking Act of 1919 (Laws 1919, p. 224; Cahill's Ill. Rev. Stat. (1931) Chap. 16a, Par. 1). Both Acts were approved on referendum.

Section 10 of the State Depositary Act (Laws 1919, p. 954; Cahill's Ill. Rev. Stat. (1931) Chap. 130, Par. 20) provides for the deposit of state funds in both national and state banks, and that:

> "No money in the State Treasury shall be deposited in any bank approved as a depositary under the terms of this Act until such bank shall have deposited security with the State Treasurer equal in market value to the amount of moneys deposited."

Provision was not made for submitting this act to a referendum.

Section 11 of the Banking Act as amended in 1929 (Laws of 1929, p. 174; Cahill's Ill. Rev. Stat. (1931) Chapter 16a, Par. 11), approved in 1930 on referendum, provides that a receiver of a closed bank:

> "shall deposit daily all money collected by him in any state or national bank selected by the auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safe-keeping and prompt payment of the moneys so deposited."

Section 51 of the Commission Form of Municipal Government Act of 1910 (Laws 1910, p. 12; Cahill's Ill. Rev. Stat. (1931) Chapter 24, Par. 374) is in the appendix (*infra,* p. 22). It was not submitted to referendum.

STATEMENT.

Petitioner, Carroll, Treasurer of Marion, Illinois, was required by statute to give a surety bond to the city. He applied to petitioner, Fidelity and Casualty Company of New York, to execute his official bond as surety, which the company agreed to, provided Carroll would procure a bank which would give collateral security for his deposits of the city's public funds. With knowledge of this condition and before execution by the Casualty Company of Carroll's bond, City National Bank of Herrin, Illinois, deposited certain of its assets with petitioner, Continental Illinois Bank and Trust Company, as security for moneys to be deposited in the Herrin bank by Carroll as City Treasurer. Thereupon the company executed Carroll's bond as surety and Carroll then began making deposits of the city's money in the Herrin bank. These arrangements were consummated on August 28, 1931. City National Bank was solvent at that time and its officers were fully authorized to act for it in this transaction.

Thereafter, on October 21, 1931, City National Bank was closed and respondent was appointed receiver. At that time there was on deposit with it $16,430 of the public moneys of the City of Marion. Respondent, receiver, demanded the bank's securities and his demand not being complied with, filed his bill in equity, making petitioners parties defendant, seeking to have the pledge declared illegal and void and to obtain return of the securities. Defendants answered the bill and the case was tried on an agreed statement of facts. (R. 31.) The District Court denied the relief prayed (R. 67-71) but upon appeal the Circuit Court of Appeals for the Seventh Circuit by a divided court, Judge Alschuler dissenting, reversed the District Court, held the pledge illegal and void, and directed return of the securities. Rehearing was denied June 1, 1933. (R. 128.)

Reasons for Allowance of Writ.

1. The Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court; and has decided them in a manner at variance with the opinions of the 4th and 5th Circuit Courts of Appeals,[1] and in conflict with the weight of authority.[2] The questions are:

> (a) Does a national bank have general power to pledge assets as security for deposits of public moneys of states or political subdivisions thereof?
>
> (b) Does the amendment of June 25, 1930, to Section 5153 Revised Statutes limit the power of a national bank to pledge assets as security for deposits of public moneys of a state or political subdivision thereof, to that possessed by state banks in the state in which the national bank is located?

The decision is of far reaching importance to municipalities and other public bodies having deposits made in reliance on pledges of collateral security similar to that here involved; to bank depositors throughout the country; to receivers and conservators and to the Comptroller of the Currency for guidance in liquidating or reorganizing banks; and to the public generally in providing hereafter for the safeguarding of public funds.

2. The Circuit Court of Appeals decided impor-

[1] See opinion of the 5th Circuit Court of Appeals in *Pottorff* v. *El Paso-Hudspeth Counties Road District of Texas*, 62 Fed. (2d) 498, and dicta of Judge Parker in the 4th Circuit Court of Appeals in *Burrowes* v. *Nimcocks*, 35 Fed. (2d), 152, 154, and in *Schumacher* v. *Eastern Bank and Trust Company*, 52 Fed. (2d) 925, 927.

[2] See authorities quoted in the Brief, *infra* p. 17.

tant questions of Illinois law in a way which conflicts with applicable Illinois decisions and statutes.

(a) Notwithstanding the clear statement of the Illinois Supreme Court in *Ward* v. *Johnson,* 95 Ill. 215, decided in 1880, that the power of an Illinois bank to receive deposits included the power to contract and agree with depositors as to terms and to secure the same by pledging assets, the Court of Appeals held that the language was not necessary to the decision, and that the case was not authoritative. The case has never been questioned in Illinois, and the courts of many states have recognized it as holding that Illinois banks do have such power.[1]

(b) The Court of Appeals overlooked the fact that the Illinois legislature by Sec. 10 of the State Depositary Act and Sec. 11 of the State Banking Act (*supra* p. 4) requiring the State Treasurer and receivers of closed banks, to take security by pledge of assets for deposits made in either state or national banks, had recognized that both state and national banks, as incidental to the right to receive deposits did have general power to make such pledges.

(c) The decision creates grave doubt as to the validity of pledges by state or national banks in Illinois as security for the deposit of state funds. The State Depositary Act was not submitted to referendum, and therefore did not operate to enlarge or affect the powers of Illinois banks. If therefore, as Judge Sparks holds, the power to accept deposits granted to Illinois banks by the banking laws of that state does not imply the power to pledge assets as security for public deposits, there is no power in Illinois banks to give security for the deposit of state funds and all existing pledges made for the deposit of state funds by Illinois banks and national banks in that state, are illegal and void.

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[1] See Footnote, Brief, p. 14.

(d) The Circuit Court of Appeals expressly held that the provisions of Section 51 of the Commission Form of Government Act limited the powers of Illinois banks notwithstanding it was entitled as an Act relating to cities and villages, did not purport to legislate relative to the powers of Illinois banks, and could not affect, either by abridgment or enlargement, powers of Illinois banks because it was not submitted to referendum as required by the state Constitution for legislation relating to banks.

It is respectfully submitted that the writ of certiorari herein prayed should issue for the reasons urged.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
Chicago, Illinois,
C. E. POPE,
H. F. DRIEMEYER,
East St. Louis, Illinois,
R. T. COOK,
Marion, Illinois,

By DAVID F. ROSENTHAL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 64 Fed. (2d) 721, and appears on pages 101-118 of the Record. The dissenting opinion of Judge Alschuler is on pages 118-126 of the Record. The opinion of the District Court is reported in 58 Fed. (2d) 341, and is on pages 55-62 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 25, 1933 (R. 127). Petition for rehearing was denied June 1, 1933 (R. 128). Jurisdiction is invoked under Section 240a of the Judicial Code as amended by Section 1 of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938).

QUESTIONS PRESENTED.

The questions presented are stated in the Petition (*ante*, p. 2).

STATUTES INVOLVED.

Pertinent portions of the statutes involved are quoted in the Petition (*ante*, pp. 3-4) and in the appendix (*infra*, pp. 19-22).

STATEMENT.

The statement of the case is in the Petition (*ante*, p. 5).

ARGUMENT.

POINT I.

NATIONAL BANKS HAVE ALWAYS HAD THE POWER TO PLEDGE ASSETS AS SECURITY FOR DEPOSITS OF PUBLIC FUNDS.

We have been unable to find any expression, prior to the enactment of the National Bank Act in 1864, either by text writer or court of last resort, questioning the general power of banks to pledge assets as security for deposits of public funds. In the only cases in which the question had been raised, the courts had held that banks did have that power.

United States v. *Robertson*, 5 Peters 641 (1831);

Planters Bank v. *Sharp et al.*, 6 Howard (U. S. 47) 300, 323 (1848);

Smith v. *Lansing*, 22 N. Y. 520 (1860);

The National Bank Act as enacted in 1864 granted express power to do a banking business (*inter alia*) "by receiving deposits," and in another section of the same act required the Secretary of the Treasury to insist upon pledges of assets to secure deposits of government funds (Petition, *ante*, p. 3); Congress thus recognized that the grant of power to do a banking business by receiving deposits carried with it the incidental power to pledge assets as security for deposits of public funds.

The power of solvent national banks to give, as a part of their legitimate business, security for deposits of public funds is likewise necessarily implied from the further provision in the National Bank Act forbidding all transfers and pledges of assets by an

insolvent bank with a view to a preference of one creditor to another (Sec. 52 of the Act, Appendix, *infra*, p. 21).

Congress has further recognized the power as incidental to the right to receive deposits by subsequent laws which require custodians of public funds to obtain collateral security from the state or national banks in which they deposit public funds. Reference is made to the statutes referred to in the petition, *ante*, p. 3, and quoted in the appendix, *infra*, pp. 19-21.[1]

The Comptroller of the Currency has consistently taken the position that national banks have the power to give collateral security for deposits of public funds.[2] The uniform and long-continued interpretation by administrative officers of the Government has frequently been given great weight and regarded as persuasive as to the true construction to be given statutory provisions.[3]

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[1] Judge Sparks, in writing the majority opinion in the Circuit Court of Appeals in this case, regardless of the result which he reached, conceded that Congress, in enacting these statutes, "did not intend to create additional power for national banks in the respect mentioned, but incidentally recognized the power which it thought already existed under a former statute." (64 Fed. (2d) 721, at p. 723; R. 103.)

[2] See H. R. Report 1657, 71st Congress, Second Session, Appendix *infra*, p. 23.

In *Pottorff* v. *El Paso-Hudspeth Counties Road District of Texas*, 62 Fed. (2d) 498, (C. C. A. V. 1933) Judge Hutcheson said at p. 498 relative to a pledge of securities there involved: "The bonds were made, the securities deposited, in the due and regular course of the business of the bank with the approval of the National Banking Department, in accordance with the long standing custom and practice of the Department under the rulings of the Comptroller to approve the giving by national banks of security for deposits of public funds."

[3] *Corsicana National Bank* v. *Johnson*, 251 U. S. 68 (1919).
Kern River Co. v. *U. S.* 257 U. S. 154 (1921).
First National Bank of St. Louis v. *State of Missouri*, 263 U. S. 640, 658 (1923).

Point II.

THE AMENDMENT OF JUNE 25, 1930, TO SECTION 5153 OF THE REVISED STATUTES DOES NOT LIMIT THE POWERS PREVIOUSLY POSSESSED BY NATIONAL BANKS TO PLEDGE ASSETS AS SECURITY FOR THE DEPOSITS OF PUBLIC MONEYS OF STATES OR POLITICAL SUBDIVISIONS THEREOF.

It is fundamental, as Judge Sparks said in his opinion in the Circuit Court of Appeals, 64 Fed. (2d), 721, 728 (R. 114), that

> "* * * one statute will not be considered as repealing another statute by implication, unless the latter statute is positively repugnant to the former or a plain substitute for it. The intent to repeal must very plainly appear. * * * Such repeals will not be indulged in if there is any other reasonable construction. * * *"

The amendment of 1930 is not so phrased as to require the conclusion that Congress necessarily intended thereby to abridge the powers previously possessed by national banks (as stated in Point I) or to limit them thereafter to giving such security only as authorized by the laws of the states in which the banks are located. The amendment is not positively repugnant to, nor plainly in substitution for provisions of the National Bank Act previously in effect.

It reasonably appears when the history of the 1930 amendment is considered that it was not prompted by any question upon the part of either Congress or the Comptroller of the Currency as to the existence of the power, but the legislation was enacted merely for the purpose of setting at rest a doubt that seemed to exist in the minds of some of the officers of the State of Minnesota.[1] The amendment therefore may

[1] See excerpts from Senate Report No. 67, 71st Congress, 2d Session, referring to the letter from the Attorney General of Minnesota; and House Report No. 1657, 71st Congress, 2d Session. (Appendix, *infra*, pp. 22-24.)

reasonably be construed as intended to be merely a clarification of existing law, and that being the case it cannot be regarded as intended to repeal any part of the National Bank Act previously in effect. That it is susceptible to a reasonable construction other than that of limitation is further demonstrated by Judge Alschuler's construction that it constitutes an enlargement of the powers previously possessed by national banks. In his dissenting opinion, 64 Fed. (2d) 721, 732 (R. 122), he said:

> * * * "Far from thereby withdrawing from the national bank the power it theretofore had to pledge its assets to secure deposits of public funds, the act was, in my judgment an enlargement of its power, so that, in addition to a general right to pledge assets to secure such deposits, it thereafter had the right, notwithstanding any prior inhibition upon national banks from doing some or any of the things in that regard which might in some particular state be done by the banks thereof."

In addition, Circuit Judge Hutcheson, in *Pottorff* v. *El Paso-Hudspeth Counties Road District of Texas,* 62 Fed. (2d) 498 (C. C. A. V), and District Judge Wham, in deciding this case, 58 Fed. (2d) 341, 347, both held that the amendment did not constitute a limitation of the powers of national banks.

Judge Parker, in *Schumacher* v. *Eastern Bank and Trust Company,* 52 Fed. (2d), 925, 927, (C. C. A. IV) which was decided in 1931, subsequent to the enactment of the amendment of June 25, 1930, to Section 5153, Rev. Stat. (but without referring to the amendment), said:

> "And this Court has expressly upheld a pledge of assets by a national bank to secure a deposit of public funds. *Burrowes* v. *Nimcocks, supra.*"

Judge Parker also wrote the opinion in *Burrowes* v. *Nimcocks,* decided in 1929, and reported in 35 Fed. (2d) 152 (C. C. A. IV).

Point III.

STATE BANKS IN ILLINOIS HAVE GENERAL POWER TO PLEDGE ASSETS AS SECURITY FOR DEPOSITS OF PUBLIC FUNDS.

There is no constitutional or statutory prohibition in Illinois against banks securing deposits by pledge of assets.

In 1880 the Supreme Court of Illinois, in *Ward* v. *Johnson,* 95 Ill. 215, 237, 246, clearly expressed its opinion that Illinois banks did have such power. The court said that a grant of power to accept deposits carried with it the right to agree upon terms and to pledge assets as security therefor. The decision in *Ward* v. *Johnson* has not been questioned by any Illinois court.[1]

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[1] We have in mind, of course, the fact that Judge Sparks reached the conclusion that what the court said in *Ward* v. *Johnson* was not necessary to a decision of the issue presented. We insist that he was in error; that *Ward* v. *Johnson* does unqualifiedly hold that Illinois banks possess, as a power necessarily implied from the power to receive deposits, the right to agree upon terms and to pledge assets as security for deposits. The courts of last resort of the states of Arizona, Florida, Mississippi, New Mexico, North Carolina, Pennsylvania, Tennessee, Utah, and Missouri, recognize *Ward* v. *Johnson* as a decision holding that Illinois state banks have the power to pledge assets for deposits.

Williams v. *Earhart,* 34 Arizona 565; 273 Pac. 728, 730 (1929).

First Amer. Bank & Trust Co. et al. v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900, 902 (1928).

U. S. Fidelity & Guar. Co. v. *Bassfield,* 148 Miss. 109, 114 So. 26, 31 (1927).

Melaven v. *Hunker,* 35 N. M. 408; 299 Pac. 1075, 1076 (N. M. 1931).

Page Trust Co. v. *Rose,* 192 N. C. 673; 135 S. E. 795, 797 (1926).

Cameron v. *Christy,* 286 Pa. 405; 133 Atl. 551, 553 (1926).

Grigsby v. *People's Bank,* 158 Tenn. 182; 11 S. W. (2d) 673, 676 (1928).

Pixton v. *Perry,* 72 Utah 129; 269 Pac. 144, 145 (1928).

French v. *School Dist.* 223 Mo. App. 53; 7 S. W. (2d) 415, 416 (1928).

The Illinois Banking Act of 1887 and its revision in 1919, both approved by the People in accordance with the Illinois constitution of 1870 (referred to in Petition *supra*, p. 4), both provide for the organization of banks with power to receive deposits and impose no limitation upon the right to agree upon the terms under which deposits are accepted.

It must be presumed that the Illinois Legislature and the People, in enacting laws authorizing the organization of banks for the purpose of deposit, knew of the judicial construction of prior legislative enactments[2] by the Illinois Supreme Court in *Ward* v. *Johnson* and intended that banks should have the power to agree upon the terms upon which deposits would be accepted.

The Illinois Legislature, by requiring the State Treasurer in the case of state funds, and the receivers of closed banks, to obtain security by pledge of assets for deposits made in either state or national banks, has recognized that both state and national

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[2] *Village of Glencoe* v. *Hurford*, 317 Ill. 203, 219; 148 N. E. 78 (1925).
People v. *I. C. R. R. Co.* 314 Ill. 373, 377; 145 N. E. 731 (1924).
Svenson v. *Hanson*, 289 Ill. 242, 248; 124 N. E. 645 (1919).
United States v. *Merriam*, 263 U. S. 179, 189 (1923).
Central Paper Co. v. *Southwith*, 56 Fed. (2d) 593, 596 (C. C. A. VI 1932).

banks, as incidental to the right to receive deposits, do have the general power to make such pledges.[1]

Point IV.

THE GREAT WEIGHT OF AUTHORITY RECOGNIZES THAT BANKS HAVE GENERAL POWER TO PLEDGE ASSETS AS SECURITY FOR DEPOSITS OF PUBLIC FUNDS.

The great weight of authority recognizes that banks have general power to pledge assets as security for deposits of public moneys.[2] The courts in the following states have decided that the power exists: Arizona; Colorado; Ohio; Oklahoma; Florida; Indiana; Iowa; Kansas; Mississippi; Missouri; Mon-

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[1] Section 10 of the State Depositary Act and Section 11 of the Banking Act are referred to in the Petition *supra*, p. 4. Neither of these statutes expressly grants additional powers to state banks relative to pledge of assets as security for the deposits provided for. The situation with reference to these statutes is the same as that which Judge Sparks pointed out with reference to the acts of Congress requiring security for deposits of Federal funds. Both of the Illinois statutes provide for deposits in national as well as in state banks, and of course the Illinois Legislature did not intend to and could not enlarge the powers of national banks. Hence the necessity for the same conclusion reached with reference to the Federal statutes, viz.,—that the Illinois Legislature, in enacting these statutes, did not intend to create additional powers for state banks in the respects mentioned, but incidentally recognized and utilized a power which it thought already existed in state banks under the General Banking Act and the general law of the state, and in addition recognized and utilized a like general power which it also thought existed in national banks.

[2] See cases collected in 65 A. L. R. 1412.

tana; New Mexico; New York; North Carolina; Pennsylvania; Tennessee; and Utah.[1]

Most of the decisions of the state courts which have

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[1] *Williams* v. *Hall*, 30 Ariz. 581; 249 Pac. 755 (1926), followed in *Williams* v. *Earhart*, 34 Ariz. 565; 272 Pac. 728 (1929).

McFerson v. *Nat'l Surety Co.* 75 Colo. 482; 212 Pac. 489 (1923).

First Amer. Bank & Trust Co. et al. v. *Town of Palm Beach*, 96 Fla. 247; 65 A. L. R. 1398; 117 So. 900 (1928); followed in *Davis* v. *Knott*, 147 So. 276 (Fla. 1933).

Schornick v. *Butler*, 185 N. E. 111 (Ind. 1933), reversing an earlier decision of the Court in the same case reported in 172 N. E. 181.

Andrews v. *Odebolt Sav. Bk.*, 203 Iowa 1335; 214 N. W. 559 (1929), following *Richards* v. *Osceola Bank*, 79 Iowa 707; 45 N. W. 294 (1890).

Interstate National Bank v. *Ferguson*, 48 Kan. 732; 30 Pac. 237 (1892).

U. S. Fidelity & Guar. Co. v. *Bassfield*, 148 Miss. 109; 114 So. 26 (1929).

French v. *School Dist.* 7 S. W. (2d) 415 (1928, Mo. App.), followed in *Consolidated School Dist.* v. *Citizens Sav. Bank*, 21 S. W. (2d) 781 (1929, Mo. App.).

Ainsworth v. *Kruger*, 89 Mont. 468; 260 Pac. 1055 (1927).

Melaven v. *Hunker*, 35 N. M. 408; 299 Pac. 1075 (1931).

Smith v. *Lansing*, 22 N. Y. 520 (1860).

Application of Broderick, 252 N. Y. S. 68 (1931).

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Page Trust Co. v. *Rose*, 192 N. C. 673; 134 S. E. 795 (1926), followed in *Richmond County* v. *Page Trust Co.* 195 N. C. 595; 142 S. E. 786 (1928).

Snider v. *Fulton*, 44 Ohio App. 238; 184 N. E. 839 (1933).

Mays v. *Board of County Commissioners, etc.* not yet reported decided by the Supreme Court of Oklahoma May 16, 1933; rehearing denied July 12, 1933; involving power of a national bank prior to the 1930 amendment.

Cameron v. *Christy*, 286 Pa. 405; 133 Atl. 558 (1926).

Grigsby v. *Peoples Bank*, 158 Tenn. 182; 11 S. W. (2d) 673 (1929).

Pixton v. *Perry*, 72 Utah 129; 269 Pac. 114 (1928).

held that banks do not have such power are distinguishable because of local statutory provisions.[3]

It is respectfully submitted that the writ of certiorari should be granted, and that upon a hearing the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and that of the District Court affirmed.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
Chicago, Illinois,
C. E. POPE,
H. F. DRIEMEYER,
East St. Louis, Illinois,
R. T. COOK,
Marion, Illinois,

By DAVID F. ROSENTHAL,
Counsel for Petitioners.

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[3] *Commercial Bank & Trust Co.* v. *Citizens Trust & Guaranty Co.* 153 Ky. 566; 156 S. W. 160 (1913); But see *City of Louisville* v. *Fidelity & Columbia Trust Co.* 245 Ky. 704; 54 S. W. (2d) 40 (1932), referring to Sessions Acts of 1932 (Ky.), c. 16, p. 46, which permit State Banks to pledge their assets to secure public deposits.

Divide County v. *Baird*, 55 N. D. 45; 212 N. W. 236 (1926).

Farmers & Merchants State Bank v. *Consolidated School Dist.* 174 Minn. 286; 219 N. W. 163 (1928).

Maryland Casualty Co. v. *Board of County Commissioners*, 128 Okla. 58; 260 Pac. 1112 (1926).

Foster v. *City of Longview*, 26 S. W. (2d) 1059 (Tex. 1930).

Austin v. *Lamar County*, 26 S. W. (2d) (Tex. 1930) 1062.

Porter v. *Canyon County Farmers Mutual Fire Ins. Co. of Idaho*, 45 Idaho 522; 263 Pac. 632 (1928).

Arkansas-Louisiana Highway Improvement Dist. v. *Taylor*, 177 Ark. 440; 6 S. W. (2d) 533 (1928).

Arkansas County Road Imp. Dist. v. *Taylor*, 185 Ark. 293; 47 S. W. (2d) (1932).

McCown v. *Edwards*, 185 Ark. 620; 48 S. W. (2d) 558 (1932).

APPENDIX.

FEDERAL ACTS RELATING TO THE DEPOSIT OF VARIOUS PUBLIC FUNDS IN STATE AND NATIONAL BANKS.

An act regulating deposits by the Comptroller of the Currency in state or national banks of receivership moneys of closed national banks (Act of June 3, 1864, Sec. 50; R. S. 5234; Chap. 106, 13 Stat. 114, as amended by Act of May 15, 1916, Chap. 121, 39 Stat. 121. 12 U. S. C. A. 192) provides:

> "* * * the Comptroller * * * shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited. * * *"

The "Federal Reserve Act," designating state banks and trust companies as depositaries of public moneys, (Act of Dec. 23, 1913, Chap. 6, Sec. 9, as amended by Act of May 7, 1928, Chap. 507, 45 Stat. 492; 12 N. S. C. A. 332) provides:

> "* * * The Secretary of the Treasury shall require of the banks and trust companies thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safe keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government."

An act regulating the deposit of postal savings funds in state and national banks (Act of Aug. 24, 1912, Chap. 387, Section 1, 37 Stat. 512; Act of May 18, 1916, Chap. 126, Section 2, 39 Stat. 159; 39 U. S. C. A. 759) provides:

> "* * * The board of trustees shall take from

such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. * * *"

An act regulating deposit by Secretary of the Interior in state and national banks in Oklahoma of net receipts from sales of lands and tribal property of Indians, (Act of Mar. 3, 1911, Chap. 210, Sec. 17, 36 Stat. 1070; 25 U. S. C. A. 156) provides:

"* * * Such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor as he may prescribe. * * *"

"An act regulating deposit by Secretary of the Interior in state and national banks of community funds of Indian tribes, (Act of May 24, 1918, Chap. 86, Sec. 28, 40 Stat. 591; 25 U. S. C. A. 162) provides:

"* * * No tribal or individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate and shall have furnished an acceptable bond or collateral security therefor, and United States bonds may be furnished as collateral security for either tribal or individual funds so deposited, in lieu of surety bonds: * * *."

An act regulating deposit by Secretary of the Treasury in state and national banks of proceeds from sales of Liberty bonds, certificates of indebtedness and war savings certificates, (Act of Sept. 24, 1917, Chap. 56, Sec. 8, 40 Stat. 291; Act of Oct. 3, 1917, Chap. 63, Sec. 214, 40 Stat. 308; Act of Apr. 4, 1918, Chap. 44, Sec. 5, 40 Stat. 504; 31 U. S. C. A. 771) provides:

"* * * Such deposits shall bear such rate or

rates of interest, and shall be secured in such manner, and shall be made upon and subject to such terms and conditions as the Secretary of the Treasury may from time to time prescribe. * * *"

The "Federal Farm Loan Act," designating Federal Land Banks and Joint Stock Land Banks as depositaries of public money, (Act of July 17, 1916, Chap. 245, Sec. 6, 39 Stat. 365; 12 U. S. C. A. 701) provides:

"* * * The Secretary of the Treasury shall require of the Federal land banks and joint stock land banks thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. * * *"

SECTION 52 OF THE NATIONAL BANK ACT PROHIBITING TRANSFERS MADE IN CONTEMPLATION OF INSOLVENCY.

Section 52 of the National Bank Act prohibiting pledges and other transfers in contemplation of insolvency (Act of June 3, 1864, Chap. 106, Sec. 52, 13 Stat. 115 and the Act of March 3, 1873, Chap. 269, Sec. 2, 17 Stat. 603; R. S. Sec. 5242; 12 U. S. C. A. 91;) provides:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another,

except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceedings, in any State, country, or municipal court."

SEC. 51, ILLINOIS COMMISSION FORM OF GOVERNMENT ACT.

Sec. 51 of the Illinois Commission Form of Municipal Government Act of 1910 (Laws 1910, p. 12 Cahill's Ill. Rev. Stat. (1931) Chapter 24, Par. 374) provides:

"In addition to the other duties now imposed by law upon the treasurer of any city or village, the said treasurer shall make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever to his credit as treasurer of said city or village, in one or more banks situated in said city or village, to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city or village, or by any two of them, and any such bank, before any such deposit is made therein * * * shall also execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep and account for, and pay over said money * * *."

EXCERPTS FROM REPORTS RELATING TO THE 1930 AMENDMENT TO R. S. 5153, SEC. 90, TITLE 12 U. S. C. A.

Senate Report No. 67, 71st Cong. 3d Sess., reporting favorably upon the bill (S. 486) refers to a letter from Attorney General of Minnesota, reading in part as follows:

"'The United States district court for this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority

generally seems to be to the effect that a bank may not in any case pledge its assets to secure a deposit unless authorized by law so to do. The national banks of this State have pledged with the State and the various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will specifically authorize such pledges by national banks.'"

House Report No. 1657, 71st Congress, 2d Sess. reporting favorably upon the bill (S. 486) amending R. S. 5153, Title 12, U. S. C. A., Sec. 90, states:

"The purpose of the bill is to permit any national banking association to give security in the form required by State law for State banks to secure deposits of public funds of a State or any political subdivision thereof."

The following letter dated May 26, 1930, addressed to the Chairman of the House Committee on Banking and Currency by Acting Secretary of the Treasury, Seymour Lowman, is there quoted in full as follows:

"Reference is made to S. 486, 'An act to amend Section 5153 of the Revised Statutes, as amended' which passed the Senate April 1, 1930, and which is now pending before the Committee on Banking and Currency of the House of Representatives.

While the office of Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with

the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486."

FILE COPY

NOV 7 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 400.

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION, AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,

Petitioners,

versus

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

BRIEF OF PETITIONERS.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
C. E. POPE,
H. F. DRIEMEYER,
R. T. COOK,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 400.

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION, AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,

Petitioners,

versus

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

BRIEF OF PETITIONERS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, as Receiver of City National Bank of Herrin, Illinois, filed his bill in equity in the District Court of the United States for the Eastern District of Illinois, seeking to have a pledge made by that bank of certain of its assets as security for deposits of the public

funds of the City of Marion, Illinois, held invalid, and to recover the securities pledged. The case was tried upon an agreed statement of facts (R. 31) and the court dismissed the bill for want of equity. (R. 67.) On appeal, the Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court, and (Judge Alschuler dissenting) held that respondent was entitled to the relief by him prayed. (R. 127.)

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 64 Fed. (2d) 721, and appears on pages 101-118 of the record. The dissenting opinion of Judge Alschuler is on pages 118-126 of the record. The opinion of the District Court is reported in 58 Fed. (2d) 341, and is on pages 55-62 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 25, 1933. (R. 127.) Petition for rehearing was denied June 1, 1933. (R. 128.) Certiorari was granted October 16, 1933 under Section 240a of the Judicial Code as amended by Section 1 of the Act of February 13, 1925. (c. 229, 43 Stat. 936, 938.)

Statement of Case.

The City of Marion, Illinois, had adopted and was operating under a statute of Illinois providing for a "Commission Form of Government."[1] Petitioner Carroll had been appointed treasurer of the city and as such was by statute required to give bond.[2] The statute further required him to

> "make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever, to his credit, as treasurer of said city or village, in one or more banks situated in said city or village, to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city or village, or by any two of them, and any such bank, before any such deposit is made therein * * * shall also execute a good and sufficient bond with sureties to be approved by the president of said council and conditioned that such bank will safely keep and account for and pay over said money * * *."[3]

Carroll applied to petitioner, The Fidelity and Casualty Company of New York, to become surety on his official bond as city treasurer. There was no bank in Marion. The Fidelity and Casualty Company agreed to execute, as surety, the official bond of Carroll as treasurer, provided Carroll would procure a bank which would give collateral security for repayment of his deposits of the public money of the City of Marion, by a pledge of some of its assets which would be satisfactory to The Fidelity and Casualty Company. Carroll, the finance commissioner of Marion, and an agent of The Fidelity and Casualty Company discussed with the

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[1] Cahill's 1931 Ill. Rev. St., Chap. 24, Par. 323-384.
[2] Id., Par. 380.
[3] Id., Par. 374.

cashier of City National Bank of Herrin the question of that bank giving security for the deposit of public money of the City of Marion by a pledge of its assets, and an arrangement was made whereby—

(a) The bank agreed to deposit with Continental Illinois Bank and Trust Company, as escrow agent, bonds belonging to the bank, to be held as security for repayment of deposits of the City of Marion's funds;

(b) Carroll and the finance commissioner agreed to make deposits of the public funds of the City of Marion in City National Bank of Herrin, which agreed that it would pay the City of Marion interest on its public moneys on deposit at the rate of 2 per cent per annum, payable monthly, on average balances in excess of $5,000; and

(c) Fidelity and Casualty Company agreed to execute, as surety, Carroll's official bond as treasurer.

In pursuance of this arrangement, on August 28, 1931, City National Bank of Herrin deposited bonds belonging to it having a par value of $23,000 with Continental Illinois Bank and Trust Company, to be held as collateral security for deposits to be made with the Herrin bank by Carroll, as treasurer of the City of Marion, of its public funds, pursuant to an escrow agreement which appears at page 10 of the record. Thereafter on the same day Carroll's bond, as treasurer, executed by The Fidelity and Casualty Company as surety, was delivered to the City of Marion (R., 34), and Carroll made his initial deposit of the public funds of the City of Marion in the Herrin bank.

When these transactions were consummated on August 28, 1931, there was no question concerning the sound financial condition of the Herrin bank. The pledge of the assets of the Herrin bank was authorized by its board of directors and was ratified by the board after

the pledge was made. The Herrin bank did not execute a bond in favor of the City of Marion conditioned for the repayment of the city's funds to be deposited with the bank.

City National Bank of Herrin failed on October 31, 1931, and respondent Sneeden was appointed receiver and thereupon took charge of the bank. At that time there was on deposit in the Herrin bank $16,430 of the public funds of the City of Marion, the deposit having been made pursuant to the arrangement hereinabove recited. On November 11, 1931, respondent Sneeden notified petitioners that he disaffirmed and repudiated the pledge made by the Herrin bank of its assets as security for the repayment of the public funds of the City of Marion on deposit in the bank, and demanded that the securities pledged be returned to him. His demand having been refused, he instituted this suit.

The questions involved are:

1. Does a national bank have general power to pledge assets as security for deposits of public moneys of states or political subdivisions thereof?

2. Does the amendment of June 25, 1930, to Section 5153 Revised Statutes, limit the power of a national bank to pledge assets as security for deposits of public moneys of a state or political subdivision thereof, to that possessed by state banks in the state in which the national bank is located?

3. Do state banks of Illinois have general power to pledge assets as security for deposits of public moneys of the state or any political subdivision thereof?

Petitioners insist that the first and third questions should be answered in the affirmative and the second in the negative and that the respondent under the facts proved in this case is not entitled to the equitable relief which he prayed in his bill.

Statutes Involved.

Federal Statutes.

By Section 8 of the National Bank Act of June 3, 1864, Chap. 106, 13 Stat. 99, 101, it was provided that national banks may

> "make contracts, * * * exercise * * * all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; * * *."

This provision was re-enacted without change in Sec. 5136 of the Revised Statutes and is still in force (12 U. S. C. A. Sec. 24).

By Section 45 of the same National Bank Act of June 3, 1864, 13 Stat. at p. 113, it was provided that the Secretary of the Treasury should require national banks to give

> "satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, * * *."

This provision was also re-enacted without change in Section 5153 of the Revised Statutes and is still in force (12 U. S. C. A. Sec. 90). There was added to it by the amendatory act of June 25, 1930, Chap. 604, 46 Stat. 809, the following:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Acts of Congress providing for the deposit of various public funds in state as well as national banks requiring the official making the deposit to take collateral security from the bank, are referred to *infra*, pp. 13, 15-18.

Illinois Constitution and Statutes.

The Illinois Constitution of 1870 (Section 5, Article XI) provides that no statute

> "authorizing or creating corporations * * * with banking powers, whether of issue, deposit or discount, nor amendments thereto"

shall become effective without a referendum.

The General Banking Act of 1887 (Laws 1887, p. 89) permitted organization of banks

> "for purposes of * * * deposit."

This provision is continued in the Banking Act of 1919 (Laws 1919, p. 224; Cahill's 1931 Ill. Rev. Stat. Chap. 16a, Par. 1). Both the 1887 and 1919 acts were approved on referendum.

Section 10 of the State Depositary Act (Laws 1919, p. 954; Cahill's 1931 Ill. Rev. Stat. Chap. 130, Par. 20) provides for the deposit of state funds in both national and state banks, and that:

> "No money in the State Treasury shall be deposited in any bank approved as a depositary under the terms of this Act until such bank shall have deposited security with the State Treasurer equal in market value to the amount of moneys deposited."

Section 11 of that act designates the type of securities to be accepted as collateral.

Provision was not made for submitting this act to a referendum.

Section 11 of the Banking Act as amended in 1929 (Laws of 1929, p. 174; Cahill's 1931 Ill. Rev. Stat.

Chapter 16a, Par. 11), approved in 1930 on referendum, provides that a receiver of a closed bank:

> "shall deposit daily all money collected by him in any state or national bank selected by the auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safekeeping and prompt payment of the moneys so deposited."

Section 51 of the Commission Form of Municipal Government Act of 1910 (Laws 1910, p. 12; Cahill's 1931 Ill. Rev. Stat. Chapter 24, Par. 374) appears on page 3, *supra*. It was not submitted to referendum.

Summary of Argument.

The National Bank Act as originally passed conferred express power upon national banks to receive deposits and recognized that this authority carried with it the power to pledge assets as security therefor by directing the Secretary of the Treasury to require government depositaries to secure deposits of public funds. The existence of the power to secure deposits of public moneys is demonstrated by other Congressional legislation, by the uniform and long continued approval by the Comptroller of Currency of such pledges, and by numerous decisions of the Federal Courts. It is apparent from the circumstances leading up to the enactment of the 1930 amendment that that was not intended as a limitation on the powers theretofore possessed by national banks, to pledge their assets as security for deposits of public moneys of states or political subdivisions thereof. With the exception of the opinion of Judge Sparks in the present case, all other expressions of the Federal Courts as to the effect of this amendment support the petitioners' contention that this amendment did not withdraw from national banks power previously existing.

However, if after 1930 the power of a national bank to pledge its assets as security for deposits of public moneys of States or political subdivisions thereof is determined by whether or not state banks in the state in which the national bank is suituated have the power, there can be no question that national banks in Illinois still possess such power. There is no constitutional or statutory prohibition in Illinois of any kind against banks securing deposits by the pledge of assets.

The only decision of the Supreme Court of Illinois on this question, *Ward* v. *Johnson,* 95 Ill. 215, held that Illinois State Banks have the power. This decision has never been questioned in the State of Illinois, and has long been relied upon as approving of such pledges. Subsequent legislation relating to banks must be presumed to have approved of the holding in that case inasmuch as there have been no statutory enactments in any way inconsistent with it.

The Illinois Commission Form of Government Act which directs the giving of surety bonds by depositaries of city funds cannot, under the Illinois Constitution which requires acts affecting the powers of bank to be submitted to a referendum, in any manner abridge the power of Banks to make such pledges, nor was it intended by the Legislature to do so. Moreover, the Legislature has in enacting two statutes, one involving state funds, and the other relating to deposits of funds held by receivers of closed state banks, recognized and utilized the power which the Legislature must have thought Banks possessed to make such pledges. The former statute was not submitted to a referendum.

If the matter is to be determined by the weight of authority, then it is clear that state banks in Illinois possess the power. The minority view to the contrary rests upon the unsound basis that such pledges are opposed to public policy. In this connection it is significant that in at least thirty-seven states, statutes have been enacted providing that depositories of public funds may furnish pledges of securities, as distinguished from a surety bond, for the protection of various types of public funds.

In any event, if it be held that the City National Bank of Herrin did not have the power to make the pledge,

the Receiver of the Bank cannot, after the pledge has been fully executed and deposits made in reliance thereon, come into a court of equity and disaffirm the transaction consummated in good faith while the Bank was solvent.

ARGUMENT.

Point I.

National Banks Have Always Had the Power to Pledge Assets as Security for Deposits of Public Funds.

By Section 8 of the National Bank Act of June 3, 1864, Chapter 106, 13 Stat. 99, 101, re-enacted without change in Section 5136 of the Revised Statutes and still in force (12 U. S. C. A. Sec. 24), it was provided that national banks may

> "make contracts, • • • exercise • • • all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; • • •"

We have found no expression, prior to the enactment of this act, by courts or text-writers questioning the general power of banks to pledge assets as security for deposits of public funds.

In a case decided in 1860, in which the question was squarely raised, the court held that banks did have that power. *Smith* v. *Lansing,* 22 N. Y. 520. This court in *United States* v. *Robertson,* 5 Pet. (30 U. S.) 641 (1831), in an opinion by Chief Justice Marshall, held that a state bank with no express statutory power to pledge assets might pledge all of its assets as security for a previous deposit by the United States. The case recognized that a bank authorized to accept deposits has the inherent power to pledge its assets as security for a public deposit. Subsequently this case was approved in *Planters Bank* v. *Sharp, et al.* 6

How. (47 U. S.) 300 (1848), where the court stated (p. 323):

> "This court in *The United States* v. *Robertson*, 5 Pet. 650, has expressly recognized the authority of a bank to give bond and assignments to pay its deposit debtors. In that case 'the directors agree to pledge to the Government of the United States the entire estate of the corporation as security for the payment of the original principal of the claim' etc. (p. 648). And such a pledge or transfer was held there to be valid."

At the time, therefore, of the enactment of the National Bank Act, this court had specifically declared that banks, generally, had power to pledge their assets as security for deposits. If the power of banks to give security for deposits of public funds was then recognized by this court as inherent in or as a necessary adjunct of the power to receive deposits, the failure of Congress to limit or restrict the power granted was not only presumptive but was conclusive of the intention that such power should exist.

Congress recognized the existence of and utilized this power in the National Bank Act, as originally enacted by providing at the same time in Section 45 of the Act of June 3, 1864, 13 Stat. at page 113, re-enacted without change in Section 5153 of the Revised Statutes and still in force (12 U. S. C. A, Sec. 90), that the Secretary of the Treasury should require national banks to give

> "satisfactory security by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, * * *."

This provision of the law is not a grant of power to national banks, but recognizing the existence of the power, prescribes the duties of the Secretary of the Treasury relative to obtaining security for the money deposited by him. This court has held that legislative

recognition of the power or authority of a national bank is as effectual as an express declaration of the existence of the power.

In *National Bank* v. *Graham*, 100 U. S. 699, (1879) the question was whether a national bank was liable for a loss resulting from its acceptance of government bonds for deposit. The defense was made that the defendant national bank "was not authorized to receive bonds and valuables for safe-keeping." The Court stated (p. 703):

> "The Forty-sixth section of the Banking Act of 1864, re-enacted in the Revised Statutes of the United States, Sec. 5228, declares that, after the failure of a national bank to pay its circulating notes, etc., 'it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking except to receive and safely keep moneys belonging to it, and to deliver special deposits.' This implied clearly that a national bank, as a part of its legitimate business, may receive such 'special deposits;' *and this implication is as effectual as an express declaration of the same* thing would have been. *United States* v. *Babbit*, 1 Black, 55." (Italics ours.)

The power of solvent national banks to give, as a part of their legitimate business, security for deposits of public funds is likewise necessarily implied from the further provision in the National Bank Act forbidding all transfers of assets by an insolvent bank with a view to a preference of one creditor to another. Section 52 of the National Bank Act (Act of June 3, 1864, Chapter 106, Sec. 52, 13 Stat. 115, and the Act of March 3, 1873, Chapter 269, Sec. 2, 17 Stat. 603; R. S. Sec. 5242; 12 U. S. C. A. 91) prohibiting pledges and other transfers in contemplation of insolvency provides:

> "All transfers * * *; all assignments * * *; * * *, made after the commission of an act of in-

> solvency, or in contemplation thereof, made with the view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, * * *, shall be utterly null and void; * * *."

Congress further recognized the power as incidental to the right to receive deposits in the following statutes requiring custodians of public funds to obtain collateral security from the state or national banks in which such funds are deposited:

An act regulating deposits by the Comptroller of the Currency in state or national banks of receivership moneys of closed national banks (Act of June 3, 1864, Sec. 50; R. S. 5234; Chap. 106, 13 Stat. 114, as amended by Act of May 15, 1916, Chap. 121, 39 Stat. 121, 12 U. S. C. A. 192) provides:

> "* * * the Comptroller * * * shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited. * * *"

The "Federal Reserve Act," designating state banks and trust companies as depositaries of public moneys, (Act of Dec. 23, 1913, Chap. 6, Sec. 9, as amended by Act of May 7, 1928, Chap. 507, 45 Stat. 492; 12 U. S. C. A. 332) provides:

> "* * * The Secretary of the Treasury shall require of the banks and trust companies thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government."

An act regulating the deposit of postal savings funds in state and national banks (Act of Aug. 24, 1912, Chap. 387, Section 1, 37 Stat. 512; Act of May 18, 1916,

Chap. 126, Section 2, 39 Stat. 159; 39 U. S. C. A. 759) provides:

> "• • • The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. • • •"

An act regulating deposit by Secretary of the Interior in state and national banks in Oklahoma of net receipts from sales of lands and tribal property of Indians, (Act of Mar. 3, 1911, Chap. 210, Sec. 17, 36 Stat. 1070; 25 U. S. C. A. 156) provides:

> "• • • Such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor as he may prescribe. • • •"

An act regulating deposit by Secretary of the Interior in state and national banks of community funds of Indian tribes, (Act of May 24, 1918, Chap. 86, Sec. 28, 40 Stat. 591; 25 U. S. C. A. 162) provides:

> "• • • No tribal or individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate and shall have furnished an acceptable bond or collateral security therefor, and United States bonds may be furnished as collateral security for either tribal or individual funds so deposited, in lieu of surety bonds: • • •."

An act regulating deposit by Secretary of the Treasury in state and national banks of proceeds from sales of Liberty bonds, certificates of indebtedness and war savings certificates, (Act of Sept. 24, 1917, Chap. 56, Sec. 8, 40 Stat. 291; Act of Oct. 3, 1917, Chap. 63, Sec. 214, 40 Stat. 308; Act of Apr. 4, 1918, Chap. 44, Sec. 5, 40 Stat. 504; 31 U. S. C. A. 771) provides:

> "• • • Such deposits shall bear such rate or

> rates of interest, and shall be secured in such manner, and shall be made upon and subject to such terms and conditions as the Secretary of the Treasury may from time to time prescribe. * * *"

Each of these statutes, except the "Federal Reserve Act", provides for deposits in either national or state banks. Congress cannot enlarge or restrict the powers of state banks. These statutes cannot, therefore, be regarded as evidence of intention to grant national banks additional powers; they do, however, show that Congress has, in each instance, assumed that not only national banks, but state banks as well, have general power to pledge their assets as security for deposits of public money and that the exercise of such power is merely an ordinary incident of the business of banks of deposit.[1]

Judge Sparks, in writing the majority opinion in the Circuit Court of Appeals in this case, regardless of the result which he reached, conceded that Congress in enacting these statutes, "did not intend to create additional power for national banks in the respect mentioned, but incidentally recognized the power which it thought al-

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[1] See also: The "Federal Farm Loan Act," designating Federal Land Banks and Joint Stock Loan Banks as depositaries of public money, and providing that such banks furnish satisfactory security therefor (Act of July 17, 1916, Chap. 245, Sec. 6, 39 Stat. 365; 12 U. S. C. A. 701); an Act regulating deposits of moneys of bankrupt estates providing that depositaries of such bonds shall furnish bonds as security therefor (Act of July 1, 1898, c. 541, Sec. 61; 30 Stat. 562, 11 U. S. C. A. Sec. 101); and an Act relating to the deposit of certain securities in lieu of surety bonds providing that whenever any person is required to furnish any bond under the laws of the United States such person may furnish certain securities in lieu thereof (Act of Feb. 24, 1919, c. 18, sec. 1320, 40 Stat. 1148, as amended by the Act of Nov. 23, 1921, c. 136, Sec. 1329; 42 Stat. 318; Act of June 2, 1924, c. 234, Sec. 2, 1029; 43 Stat. 253, 349; 6 U. S. C. A. Sec. 15).

ready existed under a former statute". (64 Fed. (2d) 721, 723; R. 103.)

The Comptroller of the Currency has consistently taken the position that national banks have the right to secure deposits of public money.

In *Pottorff* v. *El Paso-Hudspeth Counties Road District of Texas,* 62 Fed. (2d) 498, (C. C. A. 5, 1933) Judge Hutcheson said relative to a pledge of a National Bank securing public deposits of a Texas Road District (p. 498):

> "The bonds were made, the securities deposited, in the due and regular course of the business of the bank with the approval of the National Banking Department in accordance with the long-standing custom and practice of the Department under the rulings of the Comptroller to approve the giving by national banks of security for deposits of public funds."

In *Smith* v. *Baltimore & Ohio R. Co.* 48 Fed. (2d) 861 (affirmed, 56 Fed. (2d) 799), District Judge McVicar said (p. 867):

> "The Comptroller seems to have consistently held that national banks may pledge its assets as securities for public deposits (see Report 1657, House of Representatives, Seventy-first Congress, 2d Session, to accompany Senate Bill 486), * * *."

The uniform and long continued interpretation by the department charged with administering the Banking Act has great weight and is persuasive as to its true construction.

> *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 83 (1919).
>
> *Kern River Co.* v. *United States,* 257 U. S. 147, 154 (1921).
>
> *First National Bank of St. Louis* v. *State of Missouri,* 263 U. S. 640, 658 (1924).

FEDERAL DECISIONS.

The only decisions of the federal courts since the enactment of the National Bank Act in 1864 to which our attention has been drawn, in which the question of the power of banks to secure deposits has arisen, are the following:

Mothersead v. *U. S. F. & G. Co.* 22 Fed. (2d) 644 (C. C. A. 8th, 1927), certiorari denied 276 U. S. 637 (1928) *infra,* where a pledge of assets by an Oklahoma state bank to a surety company in connection with public funds was upheld although the state statute only authorized a pledge direct to the public official.

Parks v. *Knapp,* 29 Fed. (2d) 547 (C. C. A. 8, 1928), certiorari denied 278 U. S. 660 (1928), where transfers made in 1926 by a national bank for the benefit of sureties on a bond furnished by a depository of public funds were held invalid as illegal preferences in violation of Section 52 of the National Bank Act and also "under the law of the jurisdiction in which they were made". The bank was situated in Minnesota, and the Supreme Court of that state had adopted the minority view holding such pledges invalid. The court was clearly wrong in assuming that it was governed by the law of Minnesota. This case is perhaps one of the decisions referred to in the note p. 23, *infra,* as leading up to the enactment of the 1930 amendment to R. S. Sec. 5153.

Burrowes v. *Nimocks, County Treasurer,* 35 Fed. (2d) 152 (C. C. A. 4, 1929), where a pledge of assets by a national bank to secure funds of a county treasurer was upheld. Although the court spoke of the transaction under which the funds were delivered to the bank as one in the nature of a call loan, it was apparent that such public official had no authority to lend public moneys; furthermore, the court in its opinion relied upon *Page Trust Company* v. *Rose,* 192 N. C. 673; 135 S. E. 795,

infra, p. 46, one of the cases supporting the majority view that banks possess the general power to pledge assets as security for deposits of public moneys. In *Schumacher* v. *Eastern Bank and Trust Company,* 52 Fed. (2d) 925, 927 (C. C. A. 4, 1931) Judge Parker, who wrote the opinion in *Burrowes* v. *Nimocks,* said:

> "And this court has expressly upheld a pledge of assets by a national bank to secure a deposit of public funds. *Burrowes* v. *Nimocks, (supra).*"

Baltimore & O. R. Co. v. *Smith,* 56 Fed. (2d) 799 (C. C. A. 3, 1932, affirming 48 Fed. (2d) 861), where the court held a pledge of assets to secure a private deposit invalid but recognized that Congress had authorized national banks to pledge their assets to secure public deposits (56 Fed. (2d) at p. 802).

Texas & Pacific Ry. Co. v. *Pottorff,* 63 Fed. (2d) 1 (C. C. A. 5, 1933), now in this court on certiorari. In this case a national bank in 1931 pledged its assets in substitution for a surety bond previously given to secure a private deposit, and it was held that such a pledge was invalid and could be disaffirmed by the receiver of the bank. The court, however, considered fully the authorities relating to the power of a bank to pledge its assets to secure public deposits, and was inclined to the view that a bank possessed such power (63 Fed. (2d) at p. 3) as to public deposits but not as to private deposits (p. 4, id.).

This case was followed by the same court on a similar state of facts in *Illinois Central R. R. Co.* v. *Rawlings,* 66 Fed. (2d) 146 (1933). (A petition for certiorari is now pending in this Court.)

In *Feather* v. *School District,* decided June 7, 1933, (U. S. Dist. Ct., West Dist. of Pa., not yet reported), where a pledge was made by a national bank located in Pennsylvania, in 1931, of its assets to secure the deposit of a school district. The court, in upholding the validity

of the pledge referred to the 1930 amendment to Sec. 90 and to the Pennsylvania law, citing *Cameron* v. *Christy*, 286 Pa. 405, *infra*, p. 48.

Friend v. *School District, etc.*, decided Oct. 19, 1933 (U. S. Dist. Ct., West. Dist. of Pa., not yet reported). In this case it appeared that a pledge of two mortgages was made in 1932 by a national bank in Pennsylvania to secure the deposits of children and teachers of a certain school district. The court held that since such pledge was made to secure a private deposit it was invalid on the authority of *Baltimore and O. R. Co.* v. *Smith, supra.*

Evans v. *The New Haven Bank*, decided September 21, 1933, (U. S. District Court, District of Conn.; not yet reported). There it appeared that a State bank pledged certain bonds as collateral for deposits consisting of bankruptcy funds. In holding the pledge valid, the court pointed out that although neither by charter or statute was the Bank specifically empowered to secure deposits by pledge, such a pledge was supported by considerations of public policy which would not be applicable to private deposits.

Also see, *Pottorff* v. *El Paso-Hudspeth Counties Road District*, p. 24, *infra*, and *Fidelity & Deposit Co. of Maryland* v. *Kokrda*, p. 25, *infra*, both of which held valid pledges to secure public deposits made by national banks after the enactment of the 1930 amendment to R. S. 5153. To the same effect, see *Mays* v. *Board of County Commissioners, infra*, p. 47; and *Interstate Nat. Bank* v. *Ferguson, infra*, p. 44, as to pledges made by national banks prior to 1930.

In view of the foregoing, petitioners submit that there can be no question but that national banks possess the general power to pledge their assets as security for public deposits.

Point II.

The Amendment of June 25, 1930, to Section 5153 of the Revised Statutes Clarified and Enlarged, But Did Not Limit the Powers Previously Possessed by National Banks to Pledge Assets as Security For the Deposit of Public Moneys of States or Political Subdivisions Thereof.

As we have heretofore stated (p. 13, *supra*), by Section 45 of the National Bank Act of June 3, 1864, 13 Stat., at p. 113, it was provided that the Secretary of the Treasury should require national banks to give

> "satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited by them, * * *"

This provision was re-enacted without change in Section 5153 of the Revised Statutes and is still in force (12 U. S. C. A. Sec. 90). There was added to it by the amendatory act of June 25, 1930, Chap. 604, 46 Stat. 809, the following:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The Circuit Court of Appeals in this case held or assumed, without any discussion, that the 1930 amendment operated as a limitation. (64 Fed. (2d) 721, 723, R. 104.)

The amendment was not prompted by any question upon the part of either Congress or the Comptroller of the Currency as to the existence of the power, but the legislation was enacted merely for the purpose of setting at

rest a doubt that seemed to exist in the minds of some of the officers of the State of Minnesota.[1]

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[1] See, Senate Report No. 67, 71st Cong. 3d. Sess., reporting favorably upon the bill (S. 486) referring to a letter from the Attorney General of Minnesota, reading in part as follows:

> "'The United States district court for this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority generally seems to be to the effect that a bank may not in any case pledge assets to secure a deposit unless authorized by law so to do. The national banks of this State have pledged with the State and various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will specifically authorize such pledges by national banks.'";

See also; House Report No. 1657, 71st Congress, 2d Sess. reporting favorably upon the bill (S. 486) amending R. S. 5153, Title 12, U. S. C. A., Sec. 90, which states:

> "The purpose of the bill is to permit any national banking association to give security in the form required by State law for State banks to secure deposits of public funds of a State or any political subdivision thereof."

The following letter dated May 26, 1930, addressed to the Chairman of the House Committee on Banking and Currency by Acting Secretary of the Treasury, Seymour Lowman, is there quoted in full as follows:

> "Reference is made to S. 486, 'An act to amend Section 5153 of the Revised Statutes, as amended' which passed the Senate April 1, 1930, and which is now pending before the Committee on Banking and Currency of the House of Representatives.
>
> While the office of Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safe-keeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486."

In *Pottorff* v. *El Paso-Hudspeth County Road Dist. of Texas, et al.*, 62 Fed. (2d) 498, (C. C. A. 5, 1933, Certiorari denied March 20, 1933), a pledge of assets to secure road district funds made by a national bank in Texas, after the amendment, was held valid. The court with R. S. 5153 as amended called to its attention, held that the pledge was valid under the general law as well as under the law of the State of Texas.[1] The District Court Judge who tried the case (pp. 94, 95 of the Record filed in this court, Case No. 689, October Term, 1932) stated in upholding the validity of the pledge:

> "Prior to the amendment of June 25, 1930, the Comptroller of the Currency had consistently held and construed Sec. 90, 12th U. S. C. A., as permitting and authorizing national banks to put up bonds or securities for the safekeeping and prompt payment of public moneys of a state, or political subdivision thereof, deposited with such national banking association, and such position of the Comptroller had been sustained by decisions of various federal courts. Some questions seems to have arisen as to whether national banks had power as to the deposit of assets to secure public deposits equal to the power possessed by state banks, and this lead to the enactment of the amendment of June 25, 1930, to wit: Sec. 90, 12th U. S. C. A., and it is the court's holding that said amendment of June 25, 1930 was not a limitation or restriction of the powers of a national banking association as held by the courts to have existed prior to such amendment, but it was rather a broadening of the power of national banks to make deposit of assets to secure public deposits. * * *"

Judge Alschuler also held that national banks before the amendment possessed the power for which we are contending, and that such power was enlarged rather

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[1] One of the points urged in the petition for certiorari filed in this court to review the decision of the Court of Appeals which was denied, was that the amendment of June 25, 1930, to R. S. 5153 limited the power of a national bank to pledge its assets as security for the deposit of public moneys.

than restricted by the amendment. In his dissenting opinion in this case, 64 Fed. (2d) 721, 732 (R. 122), Judge Alschuler stated:

> "* * * Far from thereby withdrawing from the national bank the power it theretofore had to pledge its assets to secure deposits of public funds, the act was, in my judgment, an enlargement of its power, so that, in additional to a general right to pledge assets to secure such deposits, it thereafter had the right, notwithstanding any prior inhibition upon national banks from doing some or any of the things in that regard which might in some particular state be done by the banks thereof."

District Judge Wham, in deciding this case, 58 Fed. (2d) 341, 347, (R. 55) held that the amendment did not constitute a limitation of the powers of national banks.

In *Fidelity and Deposit Company of Maryland* v. *Kokrda*, 66 Fed. (2d) 641 (C. C. A. 10, August, 1933), the Court held valid a pledge of assets to secure County funds made by a national bank in Colorado. The Court, in denying the receiver's contention that since the pledge was not made in strict accordance with the Colorado statute it was unauthorized because of the 1930 amendment, said (page 642):

> "Section 90, *supra*, does not say a national bank may give security in the same *manner*, but that it may give security of the said *kind* as a state bank may give. *Kind* means class, character, sort, description. Webster's New International Dictionary. Had Congress intended to limit the manner of giving the security, we think it would have said, 'of the same kind and in the same manner,' or used words of equivalent import. The plain purpose of the statute was to remove any doubt of the power of national banks to give security for public deposits, and in that respect to enable them to invite public deposits on an equal footing with state banks. *Baltimore & O. R. Co.* v. *Smith* (C. C. A. 3) 56 F. (2d) 799, 802. It is our opinion that it authorizes a national bank to give the same kind of security

> for public deposits as state banks are authorized to give, in a state in which such national bank is situate, and leaves to state law the question of the procedure to be followed in the giving of such security."

It should be noted that in Illinois there is no law prescribing the type of securities to be pledged as collateral for public deposits, except that as to state funds certain kinds of securities are enumerated in Section 11 of the State Depository Act, *supra*, p. 7.

Construing the amendment of 1930 as a limitation upon the powers of national banks would necessarily have the effect of repealing Section 5153 of the Revised Statute as it previously existed. No such intent to repeal appears from the language of the amendment or the circumstances surrounding its enactment. It is fundamental, as Judge Sparks said in his opinion in the Circuit Court of Appeals, 64 Fed. (2d) 721, 728 (R. 114), that

> "* * * one statute will not be considered as repealing another statute by implication, unless the latter statute is positively repugnant to the former or a plain substitute for it. The intent to repeal must very plainly appear. *United States* v. *Claflin*, 97 U. S. 546. Such repeals will not be indulged in if there is any other reasonable construction. * * *"

We respectfully submit that the amendment of June 25, 1930, to Section 5153 of the Revised Statutes was not intended to and did not in any way derogate from the power which national banks theretofore possessed to pledge their assets as security for a deposit of public moneys belonging to a state or a political subdivision thereof.

Point III.

State Banks in Illinois Have General Power to Pledge Assets as Security for Deposits of Public Funds.

If the power of a national bank in Illinois to pledge its assets to secure public deposits is measured by the law governing state banks in Illinois there cannot be any question concerning the existence of such power.

Prior to the Illinois Constitution of 1870 there was no constitutional limitation upon the power of the Legislature to legislate concerning banks except as to banks of issue. (*People* v. *Loewenthal,* 93 Ill. 191 (1879).) The Constitution of 1870 (Sec. 5, Art. XI) provided that no statute "authorizing or creating corporations with banking powers, whether of issue, deposit or discount, nor amendments thereto" should become effective without a referendum. At the adoption of the Constitution of 1870 many banks existed under private charter and many more had been organized under the Banking Act of 1851, which, if not repealed by the Constitution, was expressly repealed by the Legislature in 1874. From that time until the adoption of the Banking Act of 1887, there was no general statute in force in Illinois providing for the organization of banks, or defining, or limiting their powers.

At the time of the adoption of the Illinois Constitution of 1870, there had been no expression by either the Illinois Legislature or its courts relative to the subject of banks pledging their assets as security for repayment of deposits. At that time, as pointed out p. 12 *supra,* this court and the Court of Appeals of New York (*Smith* v. *Lansing,* 22 N. Y. 520 (1860),) had expressly held that banks might legally pledge their assets as security for deposits.

In 1880 the Illinois Supreme Court decided the case of *Ward* v. *Johnson*, 95 Ill. 215. The Merchants, Farmers and Mechanics' Savings Bank had been organized under special charter. It operated a so-called "Investment Department" and assigned to a trustee real estate mortgages to be held as security for the repayment of amounts paid into the bank by purchasers of so-called investment certificates issued to depositors or other persons acquiring them. Upon the bank becoming insolvent, the question arose whether the securities assigned to the trustee were held primarily for the protection of certificate holders, or were available for payment of demands of depositors generally. The court, speaking by Mr. Justice Schofield, recounted the charter powers of the bank, including the power to receive money on deposit and pay interest therefor but not including the express power to pledge assets as security for deposits and then said (page 237):

> "In addition to these express powers there can be no doubt that such corporations possess, also, the implied power to borrow money. Morse on Banks and Banking, 4; *Planter's Bank* v. *Sharp*, 6 Howard (U. S.) 323; *Curtis* v. *Leavitt*, 15 N. Y. 52-3; Brice on Ultra Vires, 122 (Seward's Ed. 109).
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> *It will not therefore, be important to determine whether the certificate holders,* claiming under the trust deed, *are to be regarded as having made deposits or loans* for which their certificates were obtained, *for in the one case the requisite power is expressly given to the corporation by its charter, and in the other case it possesses the power by necessary implication.* Nor can the right of the corporation to assign or mortgage negotiable instruments which it is authorized to take be questioned. *McIntire* v. *Preston*, 5 Gilm. 48; *Planters' Bank* v. *Sharp, supra,* * * * (p. 238). The creation of the 'investment department' was not the creation of a new corporation or new agency. It was merely giving a name to a branch of business clearly within the corporate power, and indicating the system that

would be pursued in its transaction. *The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. It might execute its bond, note or certificate as evidence of the indebtedness, and secure the same by pledge or chattel mortgage, or note, securities, etc., or by real estate mortgage or trust deed, just as should be mutually agreed.* And there has been no reason suggested, and we can conceive of none, why providing a system for securing loans and deposits generally in a particular way is objectionable, when it would not be objectionable to conduct a single transaction in that way. *The business is simply that of the bank obtaining money, and so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary.*" (Italics ours.)

The court, in its opinion in this case, did not inadvertently fail to draw a distinction between loans and deposits but quite to the contrary deliberately refused to do so. Without recounting the history of deposit banking as Mr. Justice McKenna did in *Auten* v. *United States National Bank*, 174 U. S. 125, 141 (1899), Mr. Justice Shofield nevertheless pointed out as clearly as did Justice McKenna that the principal business of a bank is borrowing—"of obtaining money," and lending it out; and that the conduct of that business involved, as a matter of absolute necessity, the power to agree upon terms under which the capital was obtained whether the transaction be called a loan or a deposit. His conclusion was not predicated upon any special grant of power in the particular bank's charter, but upon the extent of authority inherently included in the grant of power to engage in the business of banking by receiving deposits. It was also contended by Savings depositors of the bank that

under its charter and by-laws all savings were deposited in trust, and that consequently the bank's investments of savings would also be in trust. The court rejected this contention (pp. 246-247):

> "But the investments being the general property of the bank, the board of directors might authorize them to be sold, assigned or pledged, or mortgaged in good faith, *to secure whatever loans or deposits* they might deem it advisable to obtain."

Judge Sparks, in writing the opinion of the Circuit Court of Appeals, discussed *Ward* v. *Johnson* extensively, and argued that the result reached by the court could and should have been reached by treating the transaction as a loan and not as either a deposit or a loan; stating (64 Fed. (2d) at 725, R. 108):

> "regardless of the court's statement that it was unnecessary to decide whether the money transactions between the bank and the certificate holders constituted loans or deposits, it is quite obvious that the court and counsel considered them as loans and so treated them";

and, concluding, Judge Sparks said that the Ward case could not be relied upon as an authority that Illinois had authorized its banks to pledge their assets as security for the payment of certain general deposits. Having so concluded, he said "the question therefore comes to us without helpful precedent from that state" (Illinois).

We submit that *Ward* v. *Johnson* cannot be so summarily disregarded as an authority. It is not important that that case could conceivably have been decided and an opinion written wherein the result would not have been predicated upon the alternate of two views. The fact remains that in the opinion in that case, the court said, without words of qualification, that it made no difference so far as the decision in that case was concerned

whether the fund there in question was a loan or a deposit, for in either event it was entirely within the power of the bank to pledge its assets as security therefor.

The language in the opinion in *Ward* v. *Johnson,* in so far as it treated the fund there in question as a deposit, cannot be regarded as *obiter dictum.* What this court said in *Union Pacific Railroad Co.* v. *Mason City & Fort Dodge Railroad Co.* 199 U. S. 160, 166 (1905) is apropos:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter,* but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. *Railroad Companies* v. *Schutte,* 103 U. S. 118, in which this court said (p. 143):
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> 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.' "

Subsequently, in *United States* v. *Title Insurance & Trust Co.* 265 U. S. 472, 486 (1924), this court said:

> "But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter,* but each is the judgment of the court and of equal

validity with the other.' *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.* 199 U. S. 160, 166; *Railroad Companies* v. *Schutte,* 103 U. S. 118, 143."

The doctrine of *Ward* v. *Johnson* has never been departed from in Illinois; no Illinois court has ever questioned the authority of that decision. The law of the state, as declared therein, has never been altered by any constitutional or legislative provision and that case must be treated as declaring the public policy of the state.

As was held in *Zeigler* v. *Illinois Trust & Savings Bank,* 245 Ill. 180 (1910), at page 193:

> "The public policy of the State or of the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials * * * Courts will not look to other sources to determine the public policy of a state. As was said in *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul Railroad Co., supra:* 'The public policy of a state or nation must be determined by its constitution, laws and judicial decisions—not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public.' "

Ward v. *Johnson* was decided fifty-three years ago. The courts of many states[1] have regarded it as

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Williams v. *Earhart,* 34 Arizona 565; 273 Pac. 728, 730 (1929).

First Amer. Bank & Trust Co. et al. v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900, 902 (1928).

U. S. Fidelity & Guar. Co. v. *Bassfield,* 148 Miss. 109, 114 So. 26, 31 (1927).

Melaven v. *Hunker,* 35 N. M. 408; 299 Pac. 1075, 1076 (N. M. 1931).

Page Trust Co. v. *Rose,* 192 N. C. 673; 135 S. E. 795, 797 (1926).

Cameron v. *Christy,* 286 Pa. 405; 133 Atl. 551, 553 (1926).

Grigsby v. *People's Bank,* 158 Tenn. 182; 11 S. W. (2d) 673, 676 (1928).

Pixton v. *Perry,* 72 Utah 129; 269 Pac. 144, 145 (1928).

French v. *School Dist.* 223 Mo. App. 53; 7 S. W. (2d) 415, 416 (1928).

holding that an Illinois bank has the power to pledge its assets for the repayment of deposits. Not only have the courts of other states so interpreted this decision, but Illinois banks and the customers of Illinois banks, have taken it at its plain meaning and have relied thereon in their business transactions, just as did petitioner, City of Marion. *Ward* v. *Johnson* has in effect become a rule of property and any doubt which might now be raised as to the meaning or the soundness of the decision should not be so resolved as to injuriously affect persons who in their financial dealings with banks have relied upon it.

At the time the Legislature enacted the Banking Act of 1887, it must be presumed that it was aware of the Supreme Court's statement of the law in *Ward* v. *Johnson*, and intended to adopt the construction given to the prior Act of the Legislature in *Ward* v. *Johnson*.[3] As clearly as the highest court of the State could express itself, it had been laid down as the law that an Illinois bank with the right to receive deposits had the power to pledge its assets as security therefor. By the Banking Act of 1887, which permitted organization of banks for the purposes of "discount" and "deposit," the Legislature authorized banks to be organized under its sanction for the purpose of deposit and this general grant of power without limitation as to its method of exercise must be understood to mean as the business of receiving deposits was then known and might lawfully be conducted in Illinois.

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[3] *Village of Glencoe* v. *Hurford*, 317 Ill. 203, 219, 148 N. E. 78 (1925).
People v. *I. C. R. R. Co.* 314 Ill. 373, 145 N. E. 731 (1924).
Svenson v. *Hanson*, 289 Ill. 242, 248, 124 N. E. 645 (1919).
U. S. v. *Merriam*, 263 U. S. 179 (1923).
Central Paper v. *Southwick*, 56 Fed. (2d) 593 (C. C. A 6, 1931).

The fact that the Legislature and the people conferred the power upon banks to accept deposits without limitation or qualification demonstrates that it was intended that the banks organized under the act should have the right and privilege of exercising the power to the full extent that the law of Illinois, as expounded by its Court of last resort, permitted. By authorizing banks to receive deposits, they were given power to agree with their depositors upon the terms upon which deposits should be received.

While the Banking Act of 1887 was revised in 1919, the language permitting organization of banks for "purposes of * * * deposit" has never been modified or changed, nor has there ever been any attempt to define the meaning of "deposit" or limit or qualify the manner in which the business of accepting deposits may be carried on. The Banking Act of 1887, and the amendments and revisions thereof, must be interpreted so as to accord with the existing state of the law. If it were intended that banks should not have power to pledge assets to secure deposits, or if the Legislature had believed sound public policy was opposed to the exercise of that power, a prohibition to that effect would have been written into the statute. If the manner in which the business of receiving deposits might be carried on had been particularly specified or if limitations had been placed upon the terms upon which banks might agree with their customers for acceptance of deposits then, if there had not been included the giving of security for deposits, the conclusion that the power was not conferred would be logical. But where the grant of power is as broad as expression can make it, there is no room for argument that exercise of a power is prohibited which had been judicially determined to exist as an incident of receiving deposits by an institution carrying on a general banking business.

The Illinois Legislature has assumed that Illinois

banks have power to pledge their assets as security for deposits of public funds. Section 10 of the State Depositary Act, enacted in 1919,[1] provides that

> "no money in the state treasury shall be deposited in any bank approved as a depository under the terms of this Act until such bank shall have deposited securities with the State Treasurer equal in market value to the amount of moneys deposited."

This Act does not purport to confer power upon state banks to secure the Treasurer's deposits; it provides that deposits may be made in either national or state banks without discriminating between them. In enacting this legislation the Legislature assumed that banks generally, state banks as well as national banks, had unquestioned power to comply with its provisions. It did not provide that the State Depository Act be submitted to referendum as would have been necessary under the Illinois Constitution in so far as Illinois state banks are concerned if such banks did not previously possess such power, but it is not invalid for that reason. That act is but a utilization of a power which the Legislature recognized as existing in banks generally, and a clear legislative declaration that the public policy of Illinois does not forbid its banks pledging their assets as security for deposits of public funds.

This public policy was again declared in the amendment of 1929 to Section 11 of the Banking Act, which was adopted on referendum in 1930.[2] That section, as amended, provides that the

> "receiver (of closed banks) shall deposit daily all money collected by him in any state or national bank selected by the Auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safekeeping and prompt payment of the money so deposited."

While the amendment to Section 11 of the Banking

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[1] Laws 1919, p. 954, Cahill's 1931 Ill. Rev. Stat., Chap. 130, Par. 20.

[2] (Laws, 1919, p. 174, Cahill's 1931 Ill. Rev. Stat., Chap. 16a, Par. 11.)

Act imposed a duty upon receivers of closed state banks to obtain security for deposits of funds collected by them, there was no accompanying amendment of the provisions of Section 1 of the Banking Act, in which are enumerated the powers of banks. By the amendment of Section 11 of the Banking Act, there was again recognition, not only by the Legislature, but by the people, of the fact that the provisions of Section 1 of the General Banking Act authorizing the organization of banks "for purposes of deposit" necessarily include authority upon the part of banks to pledge their assets as security for such deposits. Section 11 of the Banking Act, as amended, likewise assumes that all banks, both state and national, have lawful power to pledge their assets as security for deposits of the character that a receiver of a closed bank would make.

Judge Sparks in his opinion in the Circuit Court of Appeals held that paragraph 374 of the Illinois Commission Form of Government Act was another obstacle which defeated appellant's right to prevail in this action. He stated that that enactment expressly set forth what an Illinois bank was authorized to do in order to secure a deposit of public funds of a city operating under the Illinois Commission Form of Government Act, and that no implication which was not clear would be permitted to strike down that express requirement. The Court further said that even if there had been a previous policy in Illinois of permitting assets to be pledged for the security of deposits, the enactment of the Commission Form of Government Act represented a change of that policy. Paragraph 374 of the Commission Form of Government Act was in no manner, or to any extent, legislation or an attempt on the part of legislature to legislate with reference to the powers of banks. The requirement that a bond with sureties be obtained affects not only deposits made in State banks, but in National Banks as well.

Under the recent (October 21, 1933) but not yet re-

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ported decision of the Supreme Court of Illinois in *People ex rel.* v. *West Englewood, etc. Bank*, in a case involving deposits of State moneys, it must be held that this requirement of the Commission Form of Government Act was merely intended to afford an additional safeguard to the public moneys, and not to affect the right of the City to enforce a pledge of securities given in lieu of a bond.

The Legislature also, by that act, obviously did not intend to, legislate with reference to the powers of national or state banks. As stated by Judge Alschuler, 64 Fed. (2d) 731, with reference to this section of the Commission Form of Government Act (pp. 731-2, R. 120):

> "These provisions prescribe the duties and direct the conduct of the treasurer and other city officers in the matter of depositing money, but in my judgment they are in no sense or degree a limiation upon the right of a bank to pledge its assets as security for deposits. If in making the deposit the treasurer does not comply with the statute, he may remain personally liable to the municipality for the safety of the deposit, but the act does not deny to banks the right further to secure the depositing municipality or its treasurer or his sureties, by pledge of assets, even though all the statutory requirements have been observed."

Similarly, in *Schornick* v. *Butler*, 185 N. E. 111 (1933), *infra*, the Court said, with reference to the Indiana Depository Law (p. 112):

> "An examination of the title and body of that act clearly discloses that it was not intended to affect the powers of banks. It merely fixed the terms and conditions upon which public officers may make deposits in banks."

Likewise in *Millard County School District* v. *State Bank*, 14 Pac. (2d) 971, (Utah 1932), *infra*, the Court stated, with reference to a statute providing that a public official required certain security as collateral therefor (p. 971):

> "In other words, the primary purpose of the stat-

ute as amended was not to restrict the authority or power of the bank in the giving of security, but more particularly to prescribe the circumstance or condition in which the officer depositing the funds may be protected; that if he takes the class or kind of collateral prescribed by the statute as amended and does that in strict compliance therewith, he shall not be personally liable or on his official bond, for a loss of moneys so deposited by him and which may be lost by reason of the failure or insolvency of the depository. *Williams* v. *Earhart*, 34 Ariz. 565, 273 P. 728, 730."

The title of the Commission Form of Government Act is "An Act to Amend an Act Entitled 'An Act to Provide for the Incorporation of Cities and Villages' approved April 10, 1872, in force July 1, 1872, and all Acts Amendatory Thereto, By Adding Thereto Article XIII."[1] Section 13 of Article IV of the Illinois Constitution of 1870 provides that "no act hereafter passed shall embrace any more than one subject and that shall be expressed in the title."

It is obvious that the purpose of the Legislature in enacting the Commission Form of Government Act was not to legislate with reference to the powers of banks and that it could not constitutionally by that legislation so entitled enlarge or abridge the powers of banks to any extent. The fact that the legislature required cities operating under the Commission Form of Government to obtain certain character of security for deposits of their public funds does not mean that the general powers of banks were thereby constricted or that all other methods of obtaining security would be illegal. If the view of the Circuit Court of Appeals is sound, then it would have been illegal for Carroll, as City Treasurer of Marion, to have deposited the city's money in any bank, as there was no bank in the city of Marion.

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[1] Cahill's 1931 Ill. Rev. Stat., Chap. 24, Par. 323, *et seq.*

Carroll as Treasurer of the City of Marion, in the absence of statute modifying his common-law liability, was an insurer of the moneys received by him by virtue of his office, and he would not have been relieved from liability by the loss of the money without his negligence or fault, whether by failure of a bank in which he might deposit such funds, or by loss by theft or robbery, if he undertook to keep them in his personal custody.[1] The Legislature, in the Commission Form of Government Act, had two purposes in view: one, the protection of public funds, and the other providing a method for limiting the liability of the Treasurer. If practical considerations were necessary to demonstrate that provision for one method of securing deposits of public funds did not operate to render any other method, otherwise lawful, illegal, the fact that Marion, a city of some 9000 inhabitants, had no bank, would serve the purpose. It has however been frequently held, in other States, that the fact that a statute requires obtaining a bond with sureties as security for deposits of public funds does not invalidate a pledge of assets as collateral security.[2]

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[1] *People* v. *Farmers State Bank*, 338 Ill. 134, 144; 170 N. E. 236 (1930).
McCormick v. *Hopkins*, 287 Ill. 66, 75; 122 N. E. 151 (1919).
People v. *McGrath*, 279 Ill. 550, 557; 117 N. E. 74 (1917). See also, excerpt from Judge Alschuler's dissenting opinion p. 37, *supra*.

[2] *McFerson* v. *National Surety Co.* 72 Colo. 482; 212 Pac. 489 (1923).
Schornick v. *Butler*, 185 N. E. 111, 112 (Ind. 1933).
Ainsworth v. *Kruger*, 89 Mont. 468; 260 Pac. 1055 (1927).
U. S. F. & G. Co. v. *Village of Bassfield*, 148 Miss. 109; 114 So. 26 (1927).
Melaven v. *Hunker*, 35 N. Mex. 408; 299 Pac. 107 (1931).
Page Trust Co. v. *Rose*, 192 N. C. 673; 135 S. E. 795 (1926).
Grigsby v. *Peoples Bank of Martin*, 158 Tenn. 182; 11 S. W. (2d) 673 (1928).

It was argued in the Circuit Court of Appeals that in view of the Illinois constitutional provision that banking legislation must be submitted to referendum, the legislature cannot, by statute not submitted to referendum, confer power upon banks to secure deposits by "recognition." We do not seek to discover the existence of the power in recognition by the legislature. We contend that the power exists and is included in the general grant of power given by the Banking Act to receive deposits for the reasons we have stated. Recognition by the legislature involves merely utilization of the power. Such recognition is particularly important both because it evidences the fact that there is no public policy in Illinois which restricts the use or exercise of the power and because it means that the legislature has as a matter of contemporaneous construction placed the stamp of its approval upon the position for which we are contending.

In the majority opinion in the Circuit Court of Appeals it was said that the question arose whether Section 51 of the Commission Form of Government Act had in any way been modified by the revision of the General Banking Act enacted on June 23, 1919, and which became effective on December 1, 1920. The revision of the General Banking Act made in 1919 in no manner changed Section 1 of the General Banking Act theretofore in effect, and which provided for the organization of banks for the purposes of discount and deposit. There is, therefore, no question presented in this case relative to modification of the Commission Form of Government Act by any other legislation relative to banks. The Commission Form of Government Act itself evidences recognition by the legislature of authority upon the part of banks to make special provision for the security of one depositor, or class of depositors, and to pledge assets for that purpose.

The legislature unquestionably recognized the existence of implied power, at least, of banks to pay a premium to a corporation duly authorized to become surety on their bonds. Nor can we imagine that the legislature was totally unaware of the usual practice of individual, as well as corporate sureties, to demand and receive indemnity for the obligations they assume. In requiring city officials to obtain surety bonds from depository banks[1] the Legislature recognized, as incidental to the right to receive city deposits the power to do those things necessary to obtain the required surety on its bond, including indemnifying the surety by the pledge of assets for the obligation it undertakes.

In this connection see *Page Trust Co.* v. *Rose*, 192 N. C. 673; 135 S. E. 795, (1926) *infra* p. 46 where the statute required banks receiving deposits of County funds, to execute a bond for the safe keeping and proper accounting of such bonds. The Bank assigned certain of its securities to sureties on its bond. The Court stated (p. 797):

> "In the instant case the Bank of Hamlet, located and doing business in Richmond county, had express authority to protect funds of said county, deposited with it by the board of commissioners, by a bond, with either person or corporate sureties. The bank has implied power, at least, to pay a reasonable premium to a corporation duly authorized to become surety on its bond. It must be held also that it has power, when required to do so, to protect personal sureties, by transfer or assignment, in good faith, of assets in value reasonably proportionate to the liability of such sureties, under the bond which is

[1] Judge Sparks was in error if he is to be understood as stating that this statutory provision was peculiar to cities under Commission Form of Government. There are similar statutory provisions relative to other cities. (Cahill's 1931 Ill. Rev. Stat. Chap. 24, Par. 100 and 287).

given to protect and thereby secure the deposits, such bond having been authorized and required by statute. The liabilities of the bank are not increased by such assignment and transfer. It has an asset in the deposit to offset its liability."

It is clear that under the decisions and statutes, a bank organized under the laws of Illinois has the power to give security for a deposit of public moneys, so that whatever effect is given to the 1930 Amendment, the decision herein of the Court of Appeals should be reversed.

Point IV.

The Inherent Power of Banks to Pledge Assets as Security For Deposits of Public Funds is Generally Recognized.

In addition to the federal decisions and the uniform and long continued interpretation by the department charged with administering the National Bank Act, the great weight of authority holds that banks inherently possess the power to pledge their assets as security for a deposit of public moneys.

The Courts in the following states have upheld the validity of pledges made to secure the deposits of public moneys and are generally (65 A. L. R. 1412) referred to as supporting the majority view:

Colorado.

In *McFerson* v. *National Surety Company*, 75 Colo. 482; 212 Pac. 489 (1923) the court upheld a pledge of collateral to indemnify sureties on bonds securing county funds. The only statute in effect at the time of the transaction called for a surety bond.

FLORIDA.

In *First American Bank and Trust Company, et al.* v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900 (1928), the court upheld a pledge of assets given in addition to a surety bond to secure the deposits of the Town of Palm Beach and those of the Commissioners of a lake District. The court held that statutes requiring certain *state* officials to demand security for deposits, constituted a legislatively established public policy that deposits of public funds should be secured by such pledges. To the same effect, see *Davis* v. *Knott,* 147 So. 276 (Fla. 1933).

INDIANA.

In *Schornick* v. *Butler, et al.,* 185 N. E. 111 (1933), the court on rehearing overruled its prior opinion in the case (172 N. E. 181) and held valid a pledge of assets to sureties on a bank's bond given in connection with the deposit of municipal funds, although the only statute authorizing the giving of collateral security to protect public funds provided that the pledge thereof be made direct to the municipality and specified a type of assets other than that pledged by the bank in that case.

IOWA.

In *Richards* v. *The Osceola Bank,* 79 Iowa 707; 45 N. W. 294 (1890), the court upheld a pledge of assets to secure County deposits. The collateral furnished was in addition to a surety bond, which was all that was called for by the Iowa Code. *Andrews* v. *Odebolt Savings Bank,* 203 Iowa 1335; 214 N. W. 559 (1929) is to the same effect.

KANSAS.

In *Interstate National Bank* v. *Ferguson,* 48 Kan. 732; 30 Pac. 237 (1892), the court held that a national bank in Kansas, under § 5136, U. S. Revised Statutes, providing that such a bank could exercise "all such incidental powers as shall be necessary to carry on the business of banking" could pledge assets as security for municipal funds.

MISSISSIPPI.

In *U. S. Fidelity & Guaranty Co.* v. *Bassfield,* 148 Miss. 109; 114 So. 26 (1929), the court upheld a pledge of assets to the surety company, to indemnify it against loss because of its acting as surety on a depository bond given in connection with the deposit of County funds. There were statutes requiring certain public officers to take collateral security in connection with the deposit of public money in designated depositories. There were other statutes providing that public money deposited in banks other than designated depositories should constitute trust funds. The Court held that the transaction in question did not come within either statute, but it concluded that the majority view was correct and that the pledge was valid as a matter of general law.

MISSOURI.

The court in *French* v. *School District,* 223 Mo. App. 53, 7 S. W. (2d) 415 (1928) and *Consolidated School District* v. *Citizens Savings Bank,* 223 Mo. App. 940, 21 S. W. (2d) 781 (1929) upheld pledges of assets to secure the deposits of school district funds. The only statute referred to by the court authorizing the giv-

ing of collateral to secure public moneys related solely to County funds.

MONTANA.

The court in *Ainsworth* v. *Kruger,* 89 Mont. 468; 260 Pac. 1055 (1927), held that a pledge of assets to a bank director, to indemnify him against loss as surety for the bank, on bonds given to protect County deposits, was valid.

NEW MEXICO.

In *Melaven* v. *Hunker,* 35 N. M. 408; 299 Pac. 1075 (1931), the court upheld a pledge of assets to sureties to indemnify them against loss as sureties on bonds given to secure County deposits despite the fact that the particular assets pledged were not of the character prescribed by statute.

NEW YORK.

In *Smith* v. *Lansing,* 22 N. Y. 520 (1860) *supra, Application of Broderick,* 252 N. Y. Supp. 68; 140 Miss. Rep. 861 (1931), and *In re Bank of Spencerport,* 255 N. Y. Supp. 482; 143 Miss. Rep. 196 (1932), the courts have upheld pledges of assets given as security for public moneys,—in the *Smith* case for State funds, in the *Broderick* case for school district funds, and in the *Spencerport* case for town funds. In the *Spencerport* case the statute prescribing the manner of depositing town funds merely called for a surety bond. In the *Broderick* case the statute called for "security". The decision in the *Smith* case was based entirely upon the court's understanding of the general law and no statute was referred to.

In *State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750 (1933), the Court of Appeals, confining itself to private deposits, held that while a bank had no power to pledge assets for such deposits, the receiver could not reclaim the assets pledged, without repaying the deposit thereby secured.

NORTH CAROLINA.

The courts in *Page Trust Co.* v. *Rose,* 192 N. C. 673; 135 S. E. 795 (1926) and in *Richmond County* v. *Page Trust Co.,* 195 N. C. 595; 142 S. E. 786 (1928), upheld pledges made by the same bank to different individuals, to indemnify them as sureties on the bank's bond given in connection with the deposit of County funds. The North Carolina statutes required the public officials to take a surety bond, but did not provide for the taking or the giving of collateral security in lieu thereof.

OHIO.

In *Snider* v. *Fulton,* 44 Ohio App. 238, 148 N. E. 839 (1932), the court held a pledge given to the State Superintendent of Banks as security for the deposit by him of funds of a closed bank, valid. In so holding, the court pointed out that while Ohio statutes requiring officials to take collateral security in connection with deposits of state, county and municipal funds were not applicable, they did disclose a public policy in favor of protecting the particular fund in question.

OKLAHOMA.

In *Mays* v. *Board of County Commissioners of Creek County*, 23 Pac. (2nd) 664 (Okl. 1933), in 1927 a national bank in Oklahoma pledged certain of its assets to secure county funds. In upholding the validity of the pledge, the court first held that a national bank possessed the general power to pledge its assets as security for public deposits, referring to various Federal cases, including the decision of the District Court in our case, 58 Fed. (2nd) 341, and rejected the cases announcing the minority rule, stating (p. 668) that they were not

> "in any way persuasive * * * for the reason that we are governed by the rules declared by the Federal courts in so far as they announce a rule relative to national banks and we are controlled by our statute in so far as State banks are concerned."

The court then referred to the various Oklahoma statutes relating to deposits of public funds and, after considering the effect of various amendments thereto, concluded that pledges of assets could be made to secure county funds, and rejected with brief comment the contention that the pledge was invalid because of non-compliance with certain formalities provided for in the Oklahoma statutes.

With reference to the Oklahoma statutes the court cited *Maryland Casualty Co.* v. *Board of County Commissioners*, 128 Okla. 58, 260 Pac. 1112 (Nov. 1927) to the effect that a statute prohibiting pledges securing deposits had been repealed, in so far as it related to county deposits, by a subsequently enacted statute specifically dealing with county funds. In that case, the court held that the latter statute authorizing the pledging of assets in lieu of or in addition to a surety bond did not author-

ize a pledge of assets in addition to a surety bond where the amount of the bond exceeded the amount on deposit by the county and accordingly that the surety company on the bond could not avail itself of such pledge. The court did not have occasion to pass on the general question as to the power of banks to pledge their assets as security for public deposits.

In *Mothershead* v. *U. S. F. & G. Co.* 22 Fed. (2d) 664, C. C. A. 8th (Oct. 1927), certiorari denied, 276 U. S. 637 (1928), it appeared that numerous Oklahoma State banks pledged certain of their assets to a surety company to indemnify it against loss on account of its liability as surety on various public depository bonds of such banks. The Bank Commissioner in charge of the liquidation of the depository banks contended that such pledges were *ultra vires*. The court rejected this contention and pointed out that under the Oklahoma law the bank could have pledged these assets directly to the depositor in lieu of a surety bond and therefore that a pledge made directly to the surety was valid.

PENNSYLVANIA.

In *Cameron* v. *Christy,* 286 Pa. 405; 133 Atl. 551 (1926), the court upheld a pledge of assets to secure the deposits of county funds although there was no statute providing therefor. The court relied upon its earlier decision in *Ahl* v. *Rhoads,* 84 Pa. 319 (1877) and commented upon the fact that the practice of giving pledges of that character was common in Pennsylvania.

TENNESSEE.

In *Grigsby* v. *Peoples Bank,* 158 Tenn. 182, 11 S. W. (2nd) 673, (1929), a State bank's pledge of assets to indemnify the sureties on a bond given in connection with the deposit of State and County funds was held valid. The only applicable statute was one which provided that any bank might become a public depository of money of the state by executing a bond to secure such funds. The Court held that this evinced a legislative intent to require security for state funds and stating that "the record presents a legal question which is determinative and may thus be stated: Can a state bank, engaged in the general banking business, pledge its assets to secure general depositors," answered the question in the affirmative.

UTAH.

In *Pixton* v. *Perry,* 72 Utah 129, 269 Pac. 144 (1928) a state bank pledged certain of its assets to secure a deposit of county funds. It appeared that at that time there was in force a statute which prohibited preferences to any depositor by pledging the bank's assets as collateral security and there was another statute which provided with reference to public funds that the public officer having custody thereof take from the depository "collateral security" or a bond. It was contended by the State Bank Commissioner in charge of the liquidation of the bank that under such statutes the pledge of assets was invalid, and that only a bond could be furnished as security. In rejecting this contention the court held that the latter statute was controlling and, after

referring to the cases representing the so-called majority and minority view with reference to the power of a bank to pledge its assets to secure public deposits, stated (p. 145) "we find it unnecessary to determine which line in our opinion states the better rule or which is better grounded on legal principles."

In *Millard County School District* v. *State Bank,* 14 Pac. (2d) 967 (Utah, 1932) a State bank between May 11 and May 15, 1929 pledged certain of its assets consisting in part of notes and mortgages to secure a deposit of school district funds. It appeared that on May 14, 1929, an amendment was passed to the Act relating to deposits of public funds which provided that only United States, State and municipal bonds could be accepted as collateral security. The court first held that the pledge of assets occurred before this amendment went into effect and therefore that under the decision of *Pixton* v. *Perry, supra,* the pledge of assets would be valid. The court further held that even if the transaction took place after May 14, 1929, the pledge would be valid even though not consisting of the type of assets referred to in the 1929 amendment and that in any event the Bank Commissioner, as well as the bank, would be estopped from asserting the invalidity of the pledge.[1]

The decisions in the states of Arizona and Nebraska have not consistently aligned themselves with either the majority or minority view, but we comment on them for purposes of completeness.

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[1]Subsequent to these decisions, the Legislature prohibited pledges to secure deposits with certain exceptions (Laws of Utah, 1933, c. 47, p. 84 *et seq.*).

ARIZONA.

Although the court in *Williams* v. *Hall*, 30 Ariz. 581; 249 Pac. 755 (1926) and *Williams* v. *Earhart*, 34 Ariz. 565; 272 Pac. 728 (1929), upheld pledges of assets to secure the deposits of public moneys, the same court in the later case of *Button* v. *Sanguinetti*, 11 Pac. (2d) 1085, attempted to explain its previous holdings in the *Hall* and *Earhart* cases upon the estoppel theory.

NEBRASKA.

In *Bliss* v. *Mason*, 121 Neb. 484, 237 N. W. 581, (1931), a State Bank pledged certain of its assets consisting in part of corporate bonds and foreign Government bonds to sureties on a county depository bond. At the time the transaction took place there was a statute which provided for the giving of security as collateral for county deposits, but did not include the type of securities above mentioned. The court in upholding the validity of the pledge followed what it termed the majority view, holding that the bank was not limited to a pledge consisting of the type of securities enumerated in the statute, and also that such a pledge could be made directly to the sureties as well as to the county.

In *Bliss* v. *Pathfinder Irr. Dist.*, 122 Neb. 203, 240 N. W. 291, (1932), a state bank pledged its assets directly to an irrigation district to secure a deposit made by the latter. The court in holding the pledge invalid first pointed out that an irrigation district was not a municipal corporation and its deposits were not covered by the statutes providing for the pledging of assets of a bank to secure certain public deposits. The court expressly limited the holding of *Bliss* v. *Mason* to county funds, cited approvingly the cases upholding the minority view.

The courts in the following states have held that banks in the absence of statute do not have the power to pledge assets as security for deposits of public moneys, and represent what has been referred to as the "minority view."

ARKANSAS.

In *Arkansas-Louisiana Highway Improvement District* v. *Taylor,* 177 Ark. 440; 6 S. W. (2d) 533 (1928) and in *Arkansas County Road Improvement District* v. *Taylor,* 185 Ark. 293; 47 S. W. (2d) 27 (1932), the court held the pledges invalid to secure deposits of highway and School District funds. There was a statute calling for the giving of certain types of collateral security in lieu of a surety bond. The collateral was not of the specified type and the court held that the power to pledge assets should not be extended beyond that expressly authorized by the legislature.

CALIFORNIA.

In *Wood* v. *Imperial Irrigation District,* 216 Calif. 748, 17 Pac. (2d) 128, (1932), a State bank in 1925 pledged certain of its assets as collateral security to a deposit by an irrigation district. It appeared that under the laws then in force such a pledge could have been made as collateral to deposits of the State, County, municipalities or other political subdivisions, and that in 1927 a statute had been enacted which permitted the pledge of collateral to secure the deposits of irrigation districts. The court first held that the irrigation district was not a "municipal corporation" or "political subdivision" within the meaning of the constitutional provision referred to above, and also that the 1927 Act would not be applicable to a transaction which had taken

place previous thereto. The Court then based its decision on the ground that in the absence of a statutory provision expressly approving the pledge "the general policy of the law will not sanction it," relying on the decisions representing the minority view. The court also held that the State Superintendent of Banks, as trustee in charge of the liquidation of the bank, was not estopped to assert the illegality of the pledge.

KENTUCKY.

In *Commercial Bank and Trust Company* v. *Citizens Trust and Guaranty Co.*, 153 Ky. 566; 156 S. W. 160 (1913), a pledge of assets by a state bank to a surety company to indemnify it against loss for acting as surety on the bank's bond to the County Treasurer, was held invalid. The court decided that the banking laws did not grant the power expressly, and that it could not be implied. The court found that for many years state officials had invariably construed Ky. St., Sec. 4693, requiring security from depositories for state funds, and Sections 411 and 2903 *id.*, requiring security from depositories for certain court and city funds as calling for individual or corporate sureties only and not for pledges of assets. There was no statute calling for security of any kind from depositories of County funds.

In 1918, however, a statute was enacted permitting state banks to pledge their assets as collateral security for deposits of United States funds (Ky. Statutes, Carroll's 1930 Ed., Sec. 579), and in 1932, a similar statute was enacted relative to vario s types of public funds (Ky. Acts, 1932, c. 13, p. 46).

MINNESOTA.

In *Farmers and Merchants State Bank* v. *Consolidated School District No.* 3, 174 Minn. 278, 219 N. W. 163 (1928), a pledge to secure School District funds was held invalid. There was a statute providing that qualified depositories could pledge certain specified collateral security in lieu of a surety bond. The court found that the bank had not qualified as a depository and the securities pledged were not of the type authorized by the statute. The court held that the power to pledge assets, except where expressly authorized by statute, was contrary to the public policy of the state, and that Chapter 257 G. L. 1927, prohibiting them, enacted subsequent to the transaction involved, merely expressed the public policy of the state as it had previously existed.

NORTH DAKOTA.

In *Divide County* v. *Baird,* 55 N. D. 45; 212 N. W. 236 (1926), a pledge to secure County funds was held invalid. The only statute involved required the County Treasurer to take a personal bond, or in lieu thereof a surety bond. There were no statutes referred to authorizing the giving of collateral security to secure any public funds.

TEXAS.

In *Foster* v. *City of Longview,* 26 S. W. (2d) 1059 (Commission of Appeals 1930) reversing 11 S. W. (2d) 217 (Court of Civil Appeals), a state bank pledged certain of its assets to secure a deposit of city funds, and at that time there was no statute providing for the pledging of any type of collateral to secure such deposits. The court, in holding such pledge invalid, stated that in

the absence of any statutory authority, such pledge was forbidden by public policy, and illegal. In *Austin* v. *Lamar County,* 26 S. W. (2d) 1062 (1930) reversing 11 S. W. (2d) 553, (Court of Civil Appeals), the same court on the same day held invalid a pledge made by a state bank to secure a deposit of county funds, because the assets pledged were not of the type specifically provided for in a statute then in force relative to county funds. The court, in following *Foster* v. *City of Longview, supra,* held that such pledges were against the public policy of the state since not expressly authorized by statute.

These courts, following the minority view, which refused to sustain the validity of pledges of assets as security for public funds, reached their decisions by holding that in the absence of express statutory authorization, banks have no such power and that statutes authorizing the pledging of assets of a certain kind in lieu of surety bonds are exclusive and permit of no other type of collateral. In the last analysis, however, the opinions in these cases demonstrate that they are predicated upon the view that such pledges are opposed to public policy; that they perpetrate a type of constructive fraud upon unsecured depositors in favoring a limited number of secured depositors as opposed to the greater number of general depositors, who, because of the secrecy usually existing in such pledges, have no means of knowing the extent of the bank's reported assets that are so pledged. That no basis for such view exists, was clearly pointed out by Circuit Judge Alschuler in his dissenting opinion in 64 Fed. (2d) 721, 731 (R. 118) where he said:

> "It is pointed out, in support of such a public policy of the state, that ordinarily there is secrecy

in such pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.

It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is vicious practice to permit banks to advertise their 'resources' at an amount inclusive of their total deposits, without requiring that at the same time, and quite as prominently, there be stated the liabilities to which the resources are subject.

It is also pointed out that such pledging of a bank's assets may, in case of the bank's threatened disaster, enable certain depositors to be favored as against others. This, of course, would bring into the picture collusion and probably fraud, which would be dealt with when it appears, but which is not involved here, where concededly there was no suggestion of circumvention or favoritsm, and where, at the time of the pledge, the bank was solvent."

Courts in upholding pledges to secure public funds have expressed themselves in like manner.

In *Grigsby* v. *Peoples Bank,* 158 Tenn. 182; 11 S. W. (2d) 673 (1929) *supra,* the court said:

"Our statutes, requiring periodical published statements of the condition of banks, makes it a serious offense to publish a false statement. Shannon's Annotated Code, Chaps. 2104—2104a4. A true statement would include 'secured deposits,' and it is the duty of the banking department of the state to require this in the form which it is authorized to provide for such statements. If this is done, we are unable to see how any hardship can result to unsecured depositors or stockholders further than would result where the bank borrowed a fund and pledged its assets as security."

In *First American Bank & Trust Co. et al.* v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900, (1928) *supra,* the court stated:

> "It has been contended that, to hold that the pledging of securities to pretect deposits in state banks would be unfair to other depositors who are unsecured, because the financial reports of banks show as a part of the assets securities which are pledged to protect deposits, without indication that such securities are so pledged. If this contention is true, it may be easily obviated by the state comptroller requiring financial statements and reports of state banks to show what amounts of the assets of the bank is pledged as security for deposits."

An examination of the statutes of the different states in the Union demonstrates that legislative bodies generally, recognize that the public welfare demands that public funds deposited in banks be adequately protected, and have utilized the power of banks to pledge their assets as security for public funds.

In at least thirty-seven states there are statutes providing that public officials may take a pledge of securities from banks as distinguished from a surety bond for the protection of various types of public funds.[1]

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[1] *Alamaba,* Code 1928, § 893 (State Funds); *Arizona,* Laws 1923, c. 45, Laws 1927, c. 71 (Public Funds Generally); *Arkansas,* Acts 1931, Act 212, p. 684 (State Funds), Acts 1927, Act 182, p. 634 (Funds of various Improvement Districts); *California,* Statutes and Amendments 1923, p. 21 (State Funds), p. 25 id. (County and Municipal Funds), Statutes 1927, p. 188 (Irrigation District Funds); *Colorado,* Laws 1927, p. 206 (County Funds); *Florida,* Compiled General Laws 1927, § 6079 (Public Funds Generally), §§ 173, 174 id. (State Funds); *Georgia,* Laws 1931, p. 120 (State Funds); *Idaho,* Code, Ann. (1932), Title 55, p. 74 *et seq.* (Public Funds Generally), Title 65, §§ 2625, 2626, id. (State Funds); *Illinois,* Laws 1919, p. 954

As stated by this Court in *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357 (1931):

> "Primarily it is for the lawmakers to determine the public policy of the state."

In view of such extensive legislation providing for

(State Funds), Laws 1929, p. 174 (Funds of State Bank Receiver); *Indiana*, Burns Ann. Statutes 1926, § 10321 (Deposits of Sinking Fund Commissioners), § 12622 id., as amended, Acts 1929, c. 132, p. 437 (Public Funds Generally); *Kansas*, Laws 1927, c. 89, § 1 (State, Postal Savings and Public Funds Generally); *Kentucky*, Acts 1932, c. 13, p. 46, amending § 579 Kentucky Statutes, Carroll's 1930 Ed. (United States and Public Funds Generally); *Louisiana*, General Statutes (Dart) § 6639 (State and Public Funds Generally); *Maryland*, Ann. Code (Bagby, Art. 90, § 9) (State Funds), Laws 1933, p. 1092 (Funds held by bank commissioner as receiver of closed bank; Laws 1931, p. 1093, empowering state banks to deposit securities for the purpose of securing deposits of the United States, State, County, City, Town, and other political subdivisions of the State of Maryland; *Michigan*, Compiled Laws 1929, § 348 (State Funds), Public Acts 1931, No. 22, p. 33, as amended, Public Acts 1932, No. 31, p. 47 (Public Funds Generally); *Minnesota*, Laws 1933, c. 41 (Public Funds Generally); Laws 1925, p. 173 (State Funds), Laws 1925, c. 202 (Funds of Cities Operating Under Home Rule); *Mississippi*, Code 1930 Ann., c. 105, § 4326 (State Funds), § 4346 id. (County Funds), § 4357 id. (Drainage District Funds), § 4358 id. (Municipal Funds); *Missouri*, Laws 1931, p. 378 (State Funds), Laws 1927, p. 324 (Funds of Cities of the First Class), Rev. Statutes 1919, § 9585 (County Funds); *Montana*, Laws 1909, c. 129, § 1 (State Funds), Rev. Codes Supp. (1923-27), § 4767 (County, City and Town Funds); *Nebraska*, Laws 1933, c. 147, p. 564 (State Funds), Compiled Statutes 1929, c. 77, § 2508 (County Funds), 1931, c. 28, p. 115 (Funds of Cities of the First Class); *Nevada*, Compiled Laws, (Hillyer, 1929) § 7032 (State and County Funds); *New Mexico*, Laws 1933, c. 175, § 6 (Public Funds Generally, Including State); *New York*, Laws 1931, c. 45, as amended Laws 1932, c. 97, (County Funds), Cahill's Cons. Laws (1930), c. 15, § 254 (4) (School Funds), c. 57, § 10 id. (State Funds), c. 57, § 11 id. (funds of charitable and benevolent institutions supported by the State), c. 65, § 89 (20) id. (Village Funds), also see Greater New York Charter, § 196, as amended Laws 1917, c. 617; *North Carolina*, Laws 1925, c. 128, § 2 (State Funds); *Ohio*, 1 Page's Ann. Ohio Gen. Code §§ 330-3, as amended, 4 Page's Ann. Ohio, Gen. Code, p. 12 (State Funds),

pledges by banks to secure public deposits, it seems unreasonable to contend that a practice so widely sanctioned is contrary to public policy.

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1 Page's Ann. Ohio Gen. Code, § 2732 (County Funds), § 4295 id. (City and Village Funds); § 7605 id. (School Funds); *Oklahoma*, Statutes 1931, Sec. 5416 (State Funds), § 5459 id. (School Funds), § 7428 id. (County Funds); *Oregon*, Laws 1925, c. 207, § 90, p. 307, as amended, Laws 1933, c. 227, Sec. 7, p. 316 (Public Funds Generally, Including State, United States and Postal Savings Funds); *Pennsylvania*, Laws 1929, p. 865 (City Funds), Laws 1906, p. 45 (State Funds); *South Carolina*, Special acts have been passed from time to time, providing with specific reference to deposits of certain counties, that the county treasurer require the depository bank to deposit either a surety bond or certain types of security as collateral for the deposit, see, *e.g.*, Acts 1930, Act 1039, p. 887, Acts 1927, Act 47, p. 86, Acts 1926, Act 514, p. 952; *South Dakota*, Compiled Laws 1929, § 6875 (State Funds), § 6883 id., as amended, Session Laws 1929, p. 100 (County Funds), Compiled Laws 1929, § 6344, as amended, Session Laws 1929, p. 217, Session Laws 1931, p. 154, as amended, Sessions Laws 1933, p. 90 (School Funds); *Tennessee*, Public Acts 1931, c. 104, p. 361-365 (State Funds); *Texas*, Rev. Civil Statutes 1925, Art. 2429, p. 664, as amended, General Laws 1933, c. 240, p. 840, c. 244, p. 54 (State Funds), Art. 2547, p. 670 Rev. Civil Statutes 1925 (County Deposits), Laws 1929, c. 61, p. 160, expressly provides that a bank may pledge its assets as collateral security for certain public deposits; *Virginia*, Code (1930) Ann. § 2158 (State Funds); *Washington*, Remington's Compiled Statutes (1922), § 5549 (State Funds), §§ 5569, 5572 id. (City Funds), §5563 id. (County Funds), also see, Sess. Laws 1931, c. 87, p. 255 *et seq.* increasing the type of securities available as collateral under the above sections; *West Virginia*, Acts of Legislature, Extra Sess. 1932, c. 8, p. 13 (County Funds); *Wisconsin*, Statutes 1929, c. 60, § 29 (25) (Town Funds), c. 20, § 35 (38) id. Village Funds), c. 62, § 13 (c) id. (State Funds); *Wyoming*, Laws 1907, c. 30, § 8, as amended, Laws 1909, c. 94 (State Funds), Laws 1907, c. 30, § 20 (County, City, Town and School Funds), also see, Session Laws 1925, c. 83, p. 86, and c. 157, p. 220 id.

Point V.

The Receiver Should Not Under Any Circumstances Have the Relief He Seeks.

The Receiver's suit is addressed to the equity side of the Court, and he seeks equitable relief. If the facts proved do not show that equitably he is entitled to the relief prayed, then his bill should be dismissed. He had no statutory authority to disaffirm the pledge which was made; the pledge was not made in contemplation of insolvency, and consequently the provisions of Section 52 of the National Bank Act, *supra,* prohibiting pledges and other transfers in contemplation of insolvency, are not applicable.

Pledges of assets by national banks as security for public deposits of states, or other political subdivisions thereof, are not prohibited by the National Bank Act; they are not *malum in se,* nor contrary to the public policy of the federal government. National banks have general power to secure such deposits; the most that can be claimed is that there is a limitation upon the exercise of the power by certain banks or in certain states. It cannot be contended, therefore, that this pledge was unlawful *per se;* the most that can be claimed is that the bank in question exercised a general power conferred upon it in an improper manner. There is neither rule of law nor reason for requiring that the public suffer loss of security for its funds under these circumstances. The recent decision of the New York Court of Appeals in *State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750 (1933) *supra,* supports this contention. To the same effect, see *Millard County School District* v. *State Bank,* 14 Pac. (2nd) 967, 973 (Utah, 1932) *supra.*

The transactions of which the Receiver complains were fully executed at the time of his appointment; there has been no attempt to prove that any general creditor of the

bank has actually been injured or will suffer damage by reason of the bank's bonds having been pledged in order to obtain deposit of the city's funds. There is no contention that the value of the bonds pledged was excessive in proportion to the amount of city funds deposited. Of course, if the pledge had not been made, the proceeds of the bonds would, presumptively, be available in their entirety for distribution to general creditors. But, if the pledge had not been made, the bank's currency would, on the other hand, be diminished to the extent of the amount of the city's funds on deposit, and any gain to general creditors, on the one hand, would be offset by equal loss on the other. The bank itself could not have recovered its bonds without having repaid the city the amount of funds it had on deposit. If the bank had repaid the city and recovered its bonds, the amount of the bank's assets standing as security for other depositors would not have been increased one penny's worth. Other depositors, or the Comptroller of the Currency of the bank, could not, prior to its insolvency, have compelled or obtained recovery of the bonds pledged without repayment of the city's deposit. To permit the recovery, therefore, by the Receiver of the bonds pledged, without repayment of the deposit liability secured thereby, is to create in the Receiver a right, for the benefit of general creditors, which did not exist either in their favor or in favor of the bank prior to his appointment, and for which no equitable basis exists. To condemn as void a transaction, fully executed and not at the time it was entered into injurious to the bank or its depositors, and to permit the Receiver to retain the benefit of the transaction and disclaim its liability, does not satisfy that sense of justice which is equity. Congress has not intended that such a result shall be accomplished. It has declared void only such transfers or assignments of a bank's assets, after the commision of an act of insolvency, or in contempla-

tion thereof, as are made with a view to the preference of one creditor to another; by as strong implication as can be gathered from language used, the recovery of assets, transferred in ordinary course of business, for value received, and without contemplation of insolvency, is prohibited. If the deposits made by Carroll in the Herrin bank be regarded as made in violation of the provisions of the Illinois Commission Form of Government Act, then, in accordance with the usual rule, the bank became a trustee *ex maleficio* because of its receiving the deposit, and, in equity, the bonds pledged as security for the deposit should be regarded as impressed with a trust in favor of the city.

The Receiver did not in this case bring himself within the provisions of Section 52 of the National Bank Act by showing that the pledge resulted in a preference; he did not make out a case for relief appealing to the conscience of the Court, or requiring the interposition of a court of equity, and his bill should, therefore, be dismissed.

Petitioners respectfully submit that for the reasons above stated the judgment of the Circuit Court of Appeals herein should be reversed, and the decree of the District Court dismissing the bill be affirmed.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
C. E. POPE,
H. F. DRIEMEYER,
R. T. COOK,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1933.

No. 400.

CITY OF MARION, ILLINOIS, a Municipal Corporation; CONTINENTAL ILLINOIS BANK & TRUST COMPANY, a Corporation; THE FIDELITY & CASUALTY COMPANY OF NEW YORK et al.,

Petitioners,

versus

BEN SNEEDEN, as Receiver of the City National Bank of Herrin, Illinois,

Respondent.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT.

CHARLES C. MURRAH,
HOSEA V. FERRELL,
JOHN HAY,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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BRIEF OF RESPONDENT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois, the above-mentioned respondent, respectfully presents the following as his brief in the above-entitled cause.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 64 Fed. (2d) 721, and appears on pages 101-118 of the record. The dissenting opinion of Judge Alschuler is on pages 118-126 of the record. The opinion of the District Court is reported in 58 Fed. (2d) 341, and is on pages 55-62 of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 25, 1933 (R. 127). Petition for rehearing was denied June 1, 1933 (R. 128). Certiorari was granted October 16, 1933, under Section 240a of the Judicial Code as amended by Section 1 of the Act of February 13, 1925 (C. 229, 43 Stat. 936, 938).

STATEMENT OF CASE.

We wish to add the following to petitioners' statement of the case:

This case is tried upon an agreed stipulation of facts (R. 2 and 31). The deposits in question were made between August 25, 1931, and October 21, 1931. The bank failed October 21, 1931, instead of October 31, 1931, as stated on page 5 of petitioners' brief, and respondent Sneeden was appointed Receiver.

The City National Bank of Herrin did not at any time

execute to the City of Marion, Illinois, a bond in any form whatsoever securing the city's deposits. Petitioners state on page 4 of their brief that when these transactions were consummated on August 28, 1931, there was no question concerning the sound financial condition of the bank and that the pledge of the assets of the Herrin bank was authorized by the board of directors and was ratified by it after the pledge was made. No reference was made in the stipulation of facts concerning the financial condition of the Herrin bank. The claimed ratification by the board of directors was made by the cashier talking over the matter individually with various directors at board meetings and the directors acquiescing therein, although no formal action was taken by the board.

Petitioners state the questions involved are (Petitioners' Brief, p. 5):

> 1. Does a national bank have general power to pledge assets as security for deposits of public moneys of states or political subdivisions thereof?
>
> 2. Does the amendment of June 25, 1930, to Section 5153, Revised Statutes, limit the power of a national bank to pledge assets as security for deposits of public moneys of a state or political subdivision thereof, to that possessed by state banks in the state in which the national bank is located?
>
> 3. Do state banks of Illinois have general power to pledge assets as security for deposits of public moneys of the state or any political subdivision thereof?

There should be added to these questions the following:

4. Has a bank, either national or state, located in the State of Illinois, power to pledge its assets to secure the deposits of public moneys of a city organized under the Illinois Commission Form of Government Act?

5. Did the City National Bank of Herrin have the right to pledge its assets as security for the deposit of public moneys of the City of Marion?

Respondent insists that the first, third, fourth and fifth questions should be answered in the negative and that the second question should be answered in the affirmative, and we further insist that under the facts proved in this case the respondent is entitled to the equitable relief which he prayed in his bill.

SUMMARY OF ARGUMENT.

The United States Government has no sovereign right to priority of payment of debts due it, and if the Government desires to exercise such right Congress must pass the necessary legislation.

In Illinois the common law is in force and the State is entitled to priority of payment of state deposits in insolvent state banks; this priority, however, does not extend to the political subdivisions of the state.

National banks are governed by national and not by state laws and a state cannot by enacting a state statute

secure a priority for the deposits of the state, or a political subdivision thereof, in an insolvent national bank.

The power to receive deposits conferred upon a national bank by the National Bank Act did not give the national bank power to pledge its assets as security for such deposits.

Power was granted a national bank to secure United States deposits by Section 45 of the National Bank Act, and by subsequent acts of Congress.

The amendment of 1930 was passed because various courts and state officials were taking the position that the action of the Comptroller of the Currency in permitting national banks to secure deposits of states and political subdivisions thereof was unlawful and not authorized by Congress.

Neither by the Constitution nor by any statute has the State of Illinois granted to an Illinois bank the right to secure the deposit of a city by pledging the assets of the bank.

All powers of a bank must be those that are conferred in express terms by the statute or by necessary implication. Neither national nor state banks have any implied power to pledge their assets to secure deposits and it is against sound public policy that they should have such right. Instead of such right being necessary and helpful to their business it leads to their insolvency and ruin.

There is a wide difference between the relation the bank bears to its depositors and that the bank bears to those

from whom it has borrowed money. Outside of each bearing the relation of debtor and creditor, their interests are exactly the opposite.

In the case of Ward v. Johnson, 95 Ill. 215, the so-called deposit was simply a loan of money to the bank.

The Illinois Commission Form of Government Act and the amendment of June 25, 1930, of the National Bank Act, constituted the sole authority and prescribed the only method by which the City National Bank of Herrin, Illinois, could lawfully secure the deposit in question of the City of Marion, Illinois.

The pledge was ultra vires, unlawful and void. The City was a party to the unlawful transaction and must now share with the other creditors the losses of the bank and be content with its dividends.

The burden of proof is upon petitioners to show that the bank had the power to make the pledge and not upon the respondent to show that the bank did not have the power. Both the law and the equities of the case are with respondent, who represents the creditors of the bank, and the decree of the United States Circuit Court of Appeals should be affirmed.

ARGUMENT.

POINT I.

United States Government Has no Sovereign Right to Priority of Payment of Debts Due It, But Such Right Depends Upon Acts of Congress.

It has been the consistent holding of the federal courts that the United States Government has no inherent or sovereign right to the priority of payment of debts due the Government. Such right, of course, the Federal Government may exercise at any time it desires to enact a law to that effect, but in order to secure such priority the Federal Government must, by an act of Congress, take unto itself such right (United States v. Bank of North Carolina, 6 Pet. 29; United States v. State of Oklahoma, 261 U. S. 253; Mellon v. Michigan Trust Company, 271 U. S. 236).

POINT II.

The State of Illinois Has a Right of Priority of Payment of Debts Due It by Virtue of Its Sovereign Powers.

In the State of Illinois the common law is in force, and the Supreme Court of Illinois has held that as to funds of the State of Illinois, the state has prior claim upon the assets of an insolvent state bank, but that this claim applies only to state funds and does not extend to the funds of the various political subdivisions of the state, such as

counties, townships, cities, school districts, etc. (People v. Farmers State Bank, 335 Ill. 617; People v. Ohle, Receiver, 345 Ill. 405).

It therefore follows that in Illinois a municipality has no inherent or sovereign right to priority of the payment of its funds in an insolvent state bank, and that any right of the bank to secure such funds must come from the statutory powers, express or implied, of such bank.

POINT III.

National Banks Are Governed by National and Not by State Laws.

National banks are not private corporations whose principal object is individual trade and profit, but are public corporations created for public and national purposes. They are "instruments designed to be used to aid the Government in the administration of an important branch of the public service" (McCullough v. Maryland, 4 Wheat. [U. S.] 316; Osburn v. Bank of United States, 9 Wheat. 738; Farmers and M. National Bank v. Dearing, 91 U. S. 29).

National banks are governed by national and not by state laws and the power of a national bank to secure a city's deposit by pledging the assets of the bank must be derived from the statutory power, either express or implied, granted to the national bank by Congress. A state has no right by statute to control the operation, manage-

ment or liquidation of a national bank in any respect, nor can a state, by its own statute, secure a priority for debts due the state or any political subdivision thereof from an insolvent national bank (Cook County National Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561; Davis v. Elmira Savings Bank, 161 U. S. 57, 16 Sup. Ct. 502; Easton v. State of Iowa, 188 U. S. 220, 23 Sup. Ct. 288).

POINT IV.

National Banks Have No Power to Pledge Assets to Secure the Deposit of Municipal Funds in the Absence of the 1930 Amendment.

The general powers of a national bank are found in Section 8 of Chapter 106 of the Act of 1864 (13 Stat. 99, 101, Sec. 5136, R. S.), which provides the association shall have power "* * * Third. To make contracts, * * * Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; * * *."

It being the law that the United States Government does not have any inherent or sovereign right of priority in the payment of debts due the United States, Congress evidently considered it necessary to provide that United States deposits should be secured by pledging the assets of national banks, because, in the Act of Congress of 1864

above mentioned, in section 45, chapter 106 (13 Stat. L. 113, R. S. 5153) it is provided as follows:

> "All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties as depositaries of public money and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government * * *."

Congress has also from time to time passed various other acts relating to the giving of security by national banks and by state banks for the deposits of funds in the hands of United States officers. These statutes are set out in petitioners' brief.

It is evident that in Section 8 of the National Bank Act of 1864 Congress did not grant to a national bank any express power to pledge its assets to secure deposits, either public or private, and that the power of a national bank to pledge its assets to secure deposits of United States funds is derived from Section 45 of the Act of 1864 and the subsequent acts of Congress. It is therefore ap-

parent that the other acts of Congress instructing officers of the Government to require a pledge of assets to secure the deposits of Government funds, in so far as national banks are concerned, is a utilization of the power granted national banks under section 45 and not of any supposed power granted under section 8.

Section 45 of the Act of 1864 (R. S. 5153), prior to the 1930 amendment, did not give a national bank any express authority to pledge its assets to secure public deposits, excepting those of the United States Government.

Prior to the 1930 amendment, it is evident the public money referred to in section 45 was public money of the United States Government, and that section 45 authorized the pledging of assets only to secure funds of the United States.

Apparently, the Comptroller of the Currency had taken the position that national banks, prior to the 1930 Amendment, had the right to give security for the safekeeping and prompt payment of public moneys of a state or any political subdivision thereof. It is apparent from the proceedings had in the Senate and the House concerning the 1930 Amendment, as shown in note 1 on page 23 of petitioners' brief, that several courts and various state officers had taken the position that such pledges by national banks were unauthorized by law and were invalid. Therefore, Congress, in 1930, sought to give national banks the express statutory power to secure deposits of the state and political subdivisions thereof. In order to do this,

section 45, above mentioned, was amended (on June 25, 1930) by adding thereto the following provision:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

That Congress sought to give national banks additional powers to secure public deposits is borne out by the fact that the above was enacted as an amendment of section 45, which gave the national banks the power to secure United States Government funds.

Petitioners, in point two of their brief, and Judge Alschuler, in his dissenting opinion, set forth on page 25 of petitioners' brief, contend that the 1930 Amendment gave national banks additional power to pledge over and above the broad, general powers which it is claimed they already had. We find it difficult to follow the reasoning of petitioners and Judge Alschuler on this point. If national banks already had the broad, general power to secure the deposit of public funds by pledging their assets, what use or necessity was there in Congress passing the 1930 amendment? If national banks already had such broad and unrestricted power to pledge their assets to secure public deposits, Congress by passing the 1930 amendment not

only failed to enlarge their powers, but, in fact, restricted such powers, in that the 1930 amendment restricts or narrows this right to the extent that a national bank is authorized to secure deposits of public funds of states or subdivisions thereof only in the same manner as is authorized by the law of the state relating to other banking institutions where the national bank is located.

If the contention of petitioners is correct, it will be noted that Congress, instead of clarifying the law upon the subject, made the situation more confusing. We submit that if Congress had intended to clarify the law to permit pledges of assets to secure the deposits of states and political subdivisions thereof, leaving the broad, general powers which it is claimed national banks then had still in existence, it would have enacted the 1930 amendment without the following clause:

> "of the same kind as is authorized by the state in which such association is located in the case of other banking institutions in the state."

It will be noted that the doubts referred to in the correspondence set forth in note 1 on page 23 of petitioners' brief had not arisen by reason of any law enacted by any state attempting to prohibit national banks from pledging their assets, but the doubts mentioned were that Congress had given national banks such power.

Judge Alschuler, in his dissenting opinion (page 25 of petitioners' brief), states that the amendment was enacted

to remove any prior inhibitions upon national banks from doing some or any of the things in that regard which might in some particular state be done by the state banks thereof. If national banks prior to the 1930 amendment already had broad, general and unrestricted powers to secure public deposits of the state and its political subdivisions, what inhibitions were there or could there be upon the power of national banks? Neither petitioners nor Judge Alschuler in his dissenting opinion pointed out any such inhibitions. If there were any inhibitions on the claimed broad, general power, such must necessarily have been created by acts of Congress and could be definitely cited.

Since the amendment of 1930 national banks have power to secure deposits of a city only in case a state bank is authorized by the law of the state to secure such deposits. Assuming, for the sake of argument, that the City National Bank of Herrin, prior to the 1930 amendment, had the broad and general power to secure the deposit of the funds of the City of Marion, Illinois, by pledging its securities, then we submit that, by the amendment of 1930, Congress has provided in substance that the City National Bank of Herrin did not thereafter have such right unless a state bank in the State of Illinois was authorized by the law of the State of Illinois so to secure such deposits.

Where a particular statute grants a power and limits the mode of exercising it, it negatives the exercise thereof by any other method (Botany Worsted Mills v. United

States, 278 U. S. 282, 49 Sup. Ct. Rep. 129). We quote from the case of Stephens v. C. B. & Q. R. R. Co., 303 Ill. 49, on page 54, as follows:

> "Where, therefore, there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. It follows that where an act in one set of provisions gives specific and precise directions to do a particular thing, and in another set prohibits, in general terms, the doing of that which in the broad sense of the words used in the latter would cover the particular act authorized by the former, the more general provisions cannot be deemed to include the matters embraced in the more specific ones" (citing Endlich on "Interpretation of Statutes," Sec. 399).

If we assume that Section 8 of the Act of 1864 granted the City National Bank of Herrin the general and broad power to secure the deposits of the funds of the City of Marion, Illinois, by pledging its assets, then the amendment of 1930 restricted this right and gave the City National Bank of Herrin such right only in case a state bank in Illinois had the same right. The contention of petitioners is, in substance, that a broad, general power existed; that doubt of such power was entertained, and that Congress, by the 1930 amendment, intended to remove

doubt as to the existence of part of that broad power and leave everyone still in doubt as to existence of the remainder. Surely, no such intention can be attributed to that legislative body.

Petitioners, under Point One of their brief, entitled, "National banks have always had power to pledge their assets as security for deposits of public funds," cite the case of Smith v. Lansing, 22 N. Y. 520. That case upheld the validity of pledges to secure both public and private deposits. The Smith case did not involve a national bank and was decided prior to the enactment of the National Bank Act in 1864. It therefore can be no authority for the contention of petitioners that national banks have always had the power to pledge assets as security for deposits of public funds. It cannot be contended that Congress in enacting the National Bank Act took into consideration the decision of one of the states in reference to state banks. The Smith v. Lansing case, in so far as it applied to private deposits, has not been followed by the courts of New York. The case of State Bank of Commerce v. Stone, 261 N. Y. 175, 184 N. E. 750 (cited by petitioners on page 46 of their brief), decided February 28, 1933, expressly held that a New York state bank had no authority to pledge its assets to secure private deposits, and the Court further said with reference to public deposits as follows:

> "Whatever doubt there may have been regarding the power of banks to secure the deposits of **public**

moneys has been removed by statute (State Finance Law; Cons. Laws, c. 56, #8; L. 1909, ch. 10, #44; County Law, #145; L. 1931, ch. 419; L. 1932, ch. 97; and Greater New York Charter, #196). An act of the Legislature was evidently thought necessary, even as to public moneys, to enable banks to pledge certain securities for undertakings or deposits. Such were the last three enactments above mentioned (**Matter of Carnegie Trust Co.**, 206 N. Y. 390)."

The case of United States v. Robertson, 5 Pet. (U. S.) 641, decided in 1831, is ably discussed by Judge Sparks in the opinion heretofore rendered in the case at bar, who points out that neither counsel raised the point as to the power of a banking association to pledge its assets nor did the Court notice it, and on this point we quote from the dissenting opinion of Justice Baldwin referred to by Judge Sparks, as follows:

"I cannot consider this (the pledge) as anything short of a palpable perversion of the corporate powers of the directors, by depriving innocent individuals of every possible right. • • • The power to manage, control and dispose of corporate property is a special authority given by the charter. None can be exercised which is not explicitly granted; and it can only be exercised on the precise subjects over which it is given, and within the limits definitively assigned. • • • The injured creditors are not bound to show a negative of the power by any restrictions or prohibitions. It is an universal principle that he who claims under a special authority must show its existence and lawful exercise: to throw the burthen of proof on the

party whose rights will be destroyed by its abuse, would be the utter reversal of every rule which governs the execution of powers."

Justice Baldwin also stated, as to abuses of corporate powers by the agents of a corporation:

"* * * it follows, necessarily, that in so doing their acts are void as to the bank, and cannot operate as a transfer of corporate property to one who is a party to an unauthorized act."

Petitioners contend on page 13 of their brief that Section 45 of the Act of 1864 was not a grant of power to national banks, but recognized the existence of the power. The first portion of section 45 is not set out in their brief. The Court, on referring to section 45, heretofore set out in our brief, will note that all national banks designated by the Secretary of the Treasury are expressly made depositories of public funds of the United States and are required to perform such reasonable duties as such depositories of the public moneys as may be required of them; and said section also provides that the Secretary of the Treasury shall require the association to give satisfactory security, etc.

On page 14 of their brief petitioners cite the case of National Bank v. Graham, 100 U. S. 699, in which the power to deliver special deposits was in question. This case is cited as authority for their contention that a power may be granted by a statute by implication. We respect-

fully submit petitioners are very inconsistent in contending that section 45 does not contain a grant of power but is a mere recognition of power, and that section 46 contains a grant of power. The same inconsistency continues in their contention in reference to the various other acts passed by Congress and mentioned in their brief authorizing various government officials to require bond or the pledging of securities for government funds.

POINT V.

A State Bank in Illinois Has No Express Statutory Power to Secure the Deposits of an Illinois Municipality by Pledging the Assets of the Bank.

We find all express powers of Illinois state banks in the General Banking Act, entitled, "An Act to revise the law in relation to banks and banking," approved June 23, 1919, in force December 1, 1920, Chapter 16a, Cahill's 1931 Illinois Revised Statutes. Section 1 of this act is as follows:

> "It shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security, and to accept and execute trusts, and shall be subject to all the provisions of this act."

Section 9 of this act prescribed other corporate powers of such banks, and is as follows:

> "Associations organized under this act shall be bodies corporate and politic for the period for which they may be organized, may sue and be sued, may have a common seal which they may alter or renew at pleasure, may own, possess, and may carry as assets the real estate necessary in which to do its banking business, and such other real estate to which it may obtain title in the collection of its debts, but shall not carry in its assets any real estate except its banking house for the period of more than five years after acquiring title to the same.
>
> "No bank shall establish or maintain more than one banking house, or receive deposits, or pay checks at any other place than such banking house, and no banks shall establish or maintain in this or any other state or country any branch bank, nor shall it establish or maintain in this state any branch office or additional office or agency for the purpose of conducting any of its business."

The above sections of the statute prescribed the general corporate powers of a bank in Illinois, and we can find no authority for an Illinois state bank to pledge its assets to secure the deposits of an Illinois municipality in such statute. Therefore, we submit it cannot be successfully contended that an Illinois state bank is given general, express, statutory power to pledge its assets to secure the deposit of an Illinois municipality.

POINT VI.

Neither National Nor State Banks Have Any Implied Power to Secure Deposits of Public Funds by Pledging Their Assets; and it Is Against Public Policy That They Should Have Such Power.

It may generally be said that corporations can only exercise such powers as are conferred in express terms or by necessary implication. The enumeration of powers expressly granted imply the exclusion of all other powers not fairly incidental. An implied or incidental power must be one that exists to enable the corporation to carry out its express powers and it must be in a sense necessary or needful and suitable to accomplish the purpose for which the express powers are granted (People v. Chicago Gas Trust Co., 130 Ill. 268, on page 283; Calumet etc. Dock Co. v. Conkling, 273 Ill. 318, on page 324; National Home Building Assn. v. The Home Savings Bank, 181 Ill. 35, on page 42; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; People ex rel. v. Seward State Bank, 268 Ill. App. 32 [certiorari applied for and denied by Supreme Court of Illinois]; Farmers and Merchants State Bank v. Consolidated School District, 219 N. W. [Minn.] 163; Smith v. Baltimore and Ohio Railroad Company, 48 Fed. [2d] 861, on page 868, affirmed 56 Fed. [2d] 799).

In the case of Calumet etc. Dock Co. v. Conkling, supra, the Court, after speaking of the authority and power in a corporation to make a loan, on page 322, said:

"Having no express authority to loan money, if it possessed any such authority it must be found in its implied powers. The rule is, that corporations can only exercise such powers as are conferred in express terms or by necessary implication. The implied powers are presumed to exist in order that such bodies may be able to carry out the express powers granted and to accomplish the purpose of the corporation's creation. An implied or incidental power must be directly or immediately appropriate to the execution of the powers expressly granted and not one that has a slight or remote relation to it (People v. Chicago Gas Trust Co., 130 Ill. 268, and cases there cited). The enumeration of power expressly granted implies the exclusion of all others not fairly incidental. A power which the law will imply must be one in a sense necessary or needful and suitable to accomplish the object for which the express powers were granted (Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24). Whatever incidental powers are reasonably necessary to enable the corporation to perform its corporate functions are implied from the powers expressly granted (People v. Campbell, 144 N. Y. 166). These general rules are so well settled that further discussion of them or citation of authorities is not required."

We submit that banks, in this respect, are not different from any other corporation, except we think it eminently proper that when a bank claims it has an implied power the rules governing the implied powers of a corporation should be more strictly construed than when applied to private corporations, because banks cannot be considered

altogether as private corporations, but are public corporations created for public purposes.

Banks, among other things, are formed for the purpose of collecting, safeguarding and returning the people's money and at the same time affording a fair return to the stockholders, and anything which tends to destroy any of these purposes should not be countenanced or allowed. We respectfully submit that the wholesale closing of banks in the last few years has to a large extent been caused not from a lack of power, but on account of banks assuming many powers and privileges which they did not have.

Is it necessary for a state bank in Illinois, in order successfully to carry on its business, that it have the implied power secretly to favor a few of its depositors by pledging its assets to secure their deposits? The Supreme Court of Illinois had held in the case of People v. Chicago Gas Trust Company, 130 Ill. 268 (on page 297) that, since the Illinois Constitution of 1870, it has been the public policy of the State of Illinois that special privileges and rights shall not be granted to any corporation, association or individual; that no corporation shall be created by special law, and that the Constitution of 1870 reverses the old policy of granting exclusive privileges to corporations of any kind. It is manifest that the Legislature of Illinois has not seen fit expressly to grant to a bank the right to do those things so strongly condemned in the cases we have heretofore set forth. Can it then be said that an Illinois state bank has the implied power to do those things which,

instead of conducing to the safety of the bank, will in fact result in its insolvency and ruin? We insist that the answer to the above question is "No," and that instead of public policy favoring the securing of deposits by pledge of the assets of the bank, a sound public policy would prohibit such pledges.

The reasoning and law on this point is so well set forth in the case of Farmers and Merchants State Bank v. Consolidated School District, 219 N. W. (Minn.) 163, that we desire to quote from page 165 as follows:

> "The pledge of assets to secure bank deposits falls automatically within that condemnation. At the outset it evinces a willingness to favor the secured depositor at the expense of those less favored. Then it actually sets apart for his exclusive benefit part of a fund to no part of which he should have any such right, and in every part of which the other depositors should have the same right as himself. It is in derogation of that fair and equal treatment of all depositors which is fundamental in the ethics of banking. A conclusive test is that no bank can make a practice of securing deposits by pledging assets and live. A few such transactions made known to its clientele would put any bank out of business. The practice would properly be taken to show that the institution was intrinsically so little deserving of deposits that resort to the too attractive lure of collateral was compelled by adverse circumstances. No bank could long survive such an expose. The very offer of collateral for his deposit would send any discreet and informed de-

positor elsewhere. So, if the practice of securing deposits by pledge of assets is resorted to at all it must be done secretly. That is enough to condemn it. Any power, the exercise of which will not stand the light of publicity, cannot be allowed to banks. The argument that a bank has, as an implied power, one that, if used openly, is ruinous and must be resorted to clandestinely, if at all, refutes itself. Banks are intended, above all else, to be the dependable agents of thrift and commerce. To that end express powers have been conferred on them. It would violate all rules of construction to construe into their implied powers one that would go so far to defeat the purpose of the express powers."

We also quote from the case of Foster v. City of Longview, 26 S. W. (2d) (Tex.) 1059, on page 1061, as follows:

"The financial soundness of the banks of the country is a matter of public concern, and financial soundness vanishes when a bank loses the confidence of its depositors. Sound public policy, therefore, requires that these quasi-public institutions shall so deal with their depositors as to earn and hold their confidence. Nothing, it is thought, could more effectually destroy this confidence and incidentally impair the public usefulness of banks than to allow these institutions, in the absence of specific statutory authority for them to do so, and in the absence of suitable regulations in this regard, to appropriate their assets to the securing of a selected few of their depositors."

In the recent case of State Bank of Commerce v. Stone, decided by the New York Court of Appeals on February

28, 1933, and reported in 261 N. Y. 175, 184 N. E. 750, the Court quoted with approval the above-mentioned quotation from the case of Farmers and Merchants State Bank v. Consolidated School District, supra, and also quotes from the decision in Commercial B. & T. Co. v. Citizens T. & G. Co., 153 Ky. 566, 156 S. W. 160, as follows:

> "This is clearly an act ultra vires and unlawful. No such power has been conferred upon banks in this state, nor should authority to do so be granted anywhere. * * * Large depositors, if secured, might absorb the greater part of the assets of the bank and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law (Banking Law) contemplates, and was evidently framed to insure, fair and uniform dealings by the banks with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference. Public policy will not, therefore, tolerate a practice which might, sooner or later, in the event of finding trouble with the bank, enable to pay and protect the favored few at the expense of the equally deserving many. * * * Banks publish statements of their assets and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits, thus induced, are nevertheless cut off from sharing in these assets, until some unknown

favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits when its assets were secretly pledged. * * * The aim and trend of all modern legislation on the subject of banks has been to protect the depositor."

Petitioners contend that a state bank in Illinois has power to secure the deposits of a municipality and that such power is implied from the General Banking Act. To sustain this contention they quote Section 11 of the Banking Act, which provides, in substance, that receivers of closed banks shall deposit moneys collected in state or national banks selected by the Auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safekeeping and payment of the deposits. It is contended that by this act the Legislature of the State of Illinois has recognized an implied power existing under the General Banking Act. Section 11, above referred to, was submitted to the people of the State of Illinois and adopted by a referendum.

It is submitted that the power of banks in Illinois so to secure deposits of receivers of closed banks is created by section 11 and not by sections 1 and 9. The granting to the Auditor and a receiver of the right to require such securities carries with it the grant to the bank to pledge the securities. In National Bank v. Graham, 100 U. S. 699, cited on page 14 of the brief of the petitioners, the Court stated:

"The forty-sixth section of the Banking Act of 1864, re-enacted in the Revised Statutes of the United States, Sec. 5228, declares that, after the failure of a national bank to pay its circulating notes, etc., 'it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking except to receive and safely keep moneys belonging to it, and to deliver special deposits.' This implied clearly that a national bank, as a part of its legitimate business, may receive such 'special deposits'; and this implication is as effectual as an express declaration of the same thing would have been (United States v. Babbit, 1 Black 55)."

Likewise section 11 grants a power by implication rather than recognizing an implied power under the general language of sections 1 and 9.

Petitioners also contend that Section 10 of the State Depositary Act, cited on page 35 of their brief, which provides, in substance, that no money in the State Treasury shall be deposited in any bank approved as a depository under the terms of the act until such bank shall have deposited securities with the State Treasurer equal in market value to the amount of the money deposited, also recognizes an implied power under the general language of sections 1 and 9. As heretofore pointed out in our brief, the State of Illinois by virtue of its sovereign powers has a right to priority of payment of all debts due to it from an insolvent state bank. This, in many ways, is the same as the

state having a lien upon all of the assets of such bank. In that well established rule in the State of Illinois there is no element of a grant of power to a bank. The State, by virtue of its sovereign powers, simply demands and takes the State's sovereign right. If that sovereign power exists under the common law of the State, it can be utilized by the State by legislation. By that statute the State of Illinois takes unto itself a lien upon specific assets of banks becoming state depositories.

Since the State, in passing Section 10 of the Depositary Act merely utilized its inherent power to have state deposits secured and did not grant any power to the bank, said section 10 was not an amendment to the Banking Act, and it was not necessary to submit it to a referendum.

POINT VII.

There Is a Manifest Distinction Between the Relation Which an Illinois State Bank Bears to Its General Depositors and That Which the Bank Bears to Persons From Whom It Has Borrowed Money.

There is much difference of opinion among the courts of the various states as to the power of a bank to pledge its assets to secure its deposits. Much of this difference of opinion, we believe, arises from the fact that those courts holding that banks do have the right to secure their deposits by pledging their assets fail to distinguish between the relation that a bank bears to its depositors and the relation which a bank bears to those from whom

it has borrowed money. This distinction is well set forth in the opinion of Judge Sparks rendered in the case at bar (64 Fed. [2d] 721). We quote from Judge Sparks as follows:

> "It is argued that inasmuch as a bank may pledge its bills receivable to secure **loans**, by analogy the power to secure a **deposit** in like manner exists. That argument is based upon the premise that there is no real difference between a deposit and a loan, and that in either case the relation of debtor and creditor arises. It is true that there are certain characteristics which are common to each, but we think the later and better reasoned opinions hold that there is a vast difference. To define that difference with exactness would indeed be difficult, and for the purposes of this case it is quite unnecessary to do so. It is sufficient to say that the difference has always been recognized by the bankers both in theory and in practice, and their method of bookkeeping and their published reports fail to reveal any basis for an analogy. The United States Government and the various states, including Illinois, recognize the difference as shown by the reports which they require to be published. Congress and the various legislatures have recognized the difference over a period of many years by making it a criminal offense for an insolvent bank to receive **deposits**. This has been done obviously for the purpose of protecting depositors; while on the other hand the overwhelming weight of authority is that a bank has the power to borrow money to meet an emergency or an exigency, such as threatened or temporary insolvency. (See Divide County v. Baird, 55 N. D. 45, 212 N. W. 236)."

On this point we also quote from the opinion in the case of Farmers State Bank v. County of Marshall, 221 N. W. (Minn.) 242, where, in answer to the contention that the relation of ordinary debtor and creditor existed, the Court, on page 243, said:

> "In our former decision we tried to show that the duty of a bank to its depositors put it in a situation different from that of the ordinary debtor, and that among its powers was none generally to pledge its assets to secure deposits. * * * It is no answer to say that a bank might go to another bank, borrow the money wherewith to pay the depositor, and give security for money so borrowed. It does not affect the present problem that by such a transaction the other creditors of the bank would be as much prejudiced as by a pledge to the depositor himself. That is because of the basic and far-reaching difference, which we have already dealt with sufficiently, between the ordinary borrowing by a bank and the ordinary deposit therein. The difference is fundamental and in nowise modified by an extension of time on a past-due deposit. * * * The bank, unlike the ordinary debtor, is created by the state and exists under state regulation for the very purpose of receiving and paying deposits without preference between depositors. The conventional debtor is in no such situation, and the argument from analogy fails."

Likewise, in the case of Foster v. City of Longview, 26 S. W. (Texas) 1059, which was a case involving the deposit of public money of the City of Longview, the Court

pointed out the difference between a depositor and a borrower, where, on page 1061, it said:

> "On the question of the pledge of a bank's assets to secure a depositor being contrary to public policy, unless specifically authorized by statute, the courts of other states are not in accord. The basic reasoning upon which the negative view is maintained by courts holding to that view is to the effect that, inasmuch as any bank has the implied power to pledge its assets to secure a creditor, and inasmuch as a depositor is regarded in law as a creditor of the bank, a pledge of the bank's assets to secure a depositor is neither ultra vires nor illegal. Although we readily concede that a depositor is regarded in law as a creditor of the bank, and in some respects is to be treated as being on the same plane with an ordinary creditor, we do not concede that the relation of a depositor to the bank is in all respects the same as that of an ordinary creditor. Depositors constitute the main source from which any bank must receive the funds necessary to carry on its business. * * * The financial soundness of the banks of the country is a matter of public concern, and financial soundness vanishes when a bank loses the confidence of its depositors. * * * Nothing, it is thought, could more effectually destroy this confidence, and, incidentally, impair the public usefulness of banks than to allow these institutions, in the absence of specific statutory authority for them to do so, and in the absence of suitable regulations in this regard, to appropriate their assets to the securing of a selected few of their depositors."

This point is also brought out in the case of State Bank

of Commerce v. Stone, supra, where the Court, in speaking of the contention that the powers to give security for bank deposits and bank borrowings were alike, said:

> "That seems to us unsound. Bank deposits and bank borrowings are alike in but the one respect, that one result of each is the relation of debtor and creditor. In every other respect the two operations are not only different, but in complete antithesis."

It is true that when a bank receives money as a deposit and that when a bank borrows money the relation of debtor and creditor is created, but there the similarity ends. Our Legislature and the courts of Illinois have recognized a marked distinction between an Illinois state bank receiving money on deposit and borrowing money. For illustration, the Legislature has enacted as a portion of the Criminal Code (Ch. 38, Par. 38, Cahill's 1933 Illinois Revised Statutes), in substance, that if any officer of an incorporated bank in Illinois receives a deposit when the bank is insolvent, then such officer shall be guilty of embezzlement, etc. Likewise, it is pointed out in the case of Delano v. Case, 17 Ill. App. 531, affirmed in 121 Ill. Sup. 247, that the directors are in a certain sense trustees for the depositors. It is manifest that no such relation exists between the bank or its directors and a person from whom the bank has borrowed money in the due course of business.

The public policy of Illinois, in reference to the exer-

cise of powers by banking institutions, is well stated in the case of People v. Seward State Bank, 268 Ill. App. 32, from which we quote as follows:

> "The law of this state contemplates fair and uniform dealing by banks with all their depositors, and any secret agreement to protect one while others are left without security, even though no actual fraudulent intent is apparent, is nevertheless absolutely void and of no effect (Commercial Banking & Trust Co. v. Citizens' Trust & Guaranty Co., 153 Ky. 566, 45 L. R. A. [n. s.] 950).
>
> "Banking corporations, being creatures of law, possess only such powers as are expressly granted by law or are impliedly granted because necessary to carry out powers expressly granted, and the making of secret agreements for the benefit or protection of one depositor, as herein attempted, does not fall in either class.".

It will be noted the Court, in support of this doctrine, cited with approval the case of Commercial Banking & Trust Co. v. Citizens' Trust & Guaranty Co., 153 Ky. 566, 156 S. W. 160, which held that the bank had no power to pledge its assets to secure public funds, and is very similar to the case at bar.

In the Seward State Bank case a petition for writ of certiorari was presented to the Supreme Court of Illinois and denied by that Court.

Ward v. Johnson, 95 Ill. 215.

The case of Ward v. Johnson is ably discussed at length by Judge Sparks, and we find it difficult to add anything Judge Sparks has not already said.

We do not believe this case supports petitioners' contention that Illinois state banks have the implied power to secure deposits by pledge of their assets, nor that such implied power was recognized by the Illinois Legislature in passing the General Banking Act. It will be noted the Merchants, Farmers & Mechanics Savings Bank was not organized under general law, but had a special charter granting it many powers not now vested in state banks. It, therefore, cannot be contended that the Legislature, in passing a general banking act, intended to grant to all banks the powers judicially determined to have been vested in Illinois banks organized under a special act of the Legislature. The special charter gave the bank power to

> "* * * make such special regulations in reference to trust funds, deposits or savings as shall best aid the depositors and parties interested, by accumulating and increasing the same, allowing and receiving such rate of interest therefor, not greater than hereinbefore mentioned, as may be agreed upon * * *."

The charter further provided:

> "The business of said corporation shall be con-

ducted by the directors, and in such manner as they may direct."

The Court, in the first sentence of its opinion, said:

"The principal question arising upon this record is, did 'The Merchants, Farmers & Mechanics Savings Bank' have power to borrow money and issue 'investment certificates' therefor, secured by trust deed, as was here done?"

On pages 236 and 237 we quote from the Court's decision:

"Sec. 3. The said corporation shall be authorized to receive money from any person or persons who may wish to deposit the same. * * *

"Thus, it will be seen, express power is given to receive money on deposit * * *.

"In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money. * * *"

Evidently the exercise of powers by banks organized under special acts of the Legislature granting to them varied powers did not meet with the approval of the Legislature, and a uniform banking act was deemed advisable to correct the evils of this system.

That the Supreme Court of Illinois has considered the "investment certificates" in controversy in the Ward v. Johnson case as a loan of money to the bank and not as a deposit is further borne out by the case of Alton Mfg.

Co. v. Garrett Biblical Institute, 243 Ill. 298, where the Court, in speaking upon the implied powers of a corporation to borrow money, on page 302 quoted from the case of Ward v. Johnson as follows:

> "This power to borrow is not limited either to particular kinds of corporations or to those organized for any particular purpose, but is possessed practically by all corporations whose business or objects may render it necessary or proper to resort to this method of raising money."

If the "investment certificates" in the Ward case were in fact loans, then the question of the power of an Illinois state bank to secure its general depositors by pledging its assets was not in issue.

The Ward case has been considered and explained at length in the following cases: Smith v. Baltimore & Ohio Railroad Co., 48 Fed. (2d) 861, on page 868; Farmers and Merchants State Bank v. Consolidated School District, 219 N. W. 163, on page 165, and State Bank of Commerce v. Stone, 261 N. Y. 175, 184 N. E. 750.

POINT VIII.

The Illinois Commission Form of Government Act and the Amendment of June 25, 1930, of the National Bank Act, Constituted the Sole Authority and Prescribed the Only Method by Which the City National Bank of Herrin, Illinois, Could Lawfully Secure the Deposit in Question of the City of Marion, Illinois.

The only express authority that a state bank in Illinois has in any respect to secure the deposit of public moneys of a city organized under the Commission Form of Government Act is contained in Section 51 of the Commission Form of Government Act (Cahill's Illinois Revised Statutes 1931, page 412), which provides as follows:

> "In addition to the other duties now imposed by law upon the treasurer of any city or village, the said treasurer shall make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever to his credit as treasurer of said city or village, in one or more banks situated in said city or village, to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city or village, or by any two of them, and any such bank, before any such deposit is made therein, shall be required to enter into an obligation with the said council to pay into the treasury of such city or village interest on the monthly balances of such deposits at a rate to be fixed by the president of said council, the commissioner of accounts and finance, and the treasurer, or by any two of them, and which rate may be changed in the same

manner—such rate to be not less than three (3) per centum per annum, and shall also execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep and account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depositary bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank. All interest paid by any such bank upon such balances shall be collected by the treasurer of said city or village, and shall be by him reported in his next statement following such collection, and shall be considered and treated as a part of the general fund of such city or village, subject to use for any legitimate municipal purpose."

Since the above-mentioned section of the Commission Form of Government Act constitutes the only statutory authority for an Illinois state bank to secure the deposits of a city organized under the Illinois Commission Form of Government Act, and since the 1930 amendment to the National Bank Act provides in substance that a national bank located in Illinois shall have power to secure the deposits of an Illinois municipality organized under the Commission Form of Government Act to the same extent that a state bank has the same authority, it then necessarily follows that said Section 51 of said Act and the 1930 amendment to the National Bank Act constituted the sole express statutory authority for the City National Bank of

Herrin, Illinois, to secure the deposits of the City of Marion, Illinois.

It will be noted that section 51 of the above-mentioned act did not give a bank any power to pledge its assets, but merely provided that before any deposit was made in the bank, it must give bond with surety, etc. Such giving of the bond would not increase the liability of the bank beyond what it incurred at the time the deposit was made, nor would it give the city any additional rights with reference to the assets of the bank not held by a general creditor of the bank. The additional security the city received from the giving of the bond by the bank to the city would arise by reason of the liability of the surety on the bank's bond. The rights of the city against the bank would be to participate in all the assets of the bank as a general creditor, and if the city did not secure payment of its deposit in full, it could then have recourse against the surety. Thus, the relation created between the bank and the city would be the same relation and only the same relation as existed between the bank and all other general depositors.

In the case at bar, since the bank had no statutory authority to pledge its assets to the City, it attempted to do indirectly what it could not do directly, in that it pledged its securities with a third person for the attempted use and benefit of the City, and also of the surety company signing the Treasurer's bond. The case at bar is in many respects similar to the case of Commercial Bank and Trust

Company v. The Citizens Trust and Guaranty Company, 153 Ky. 566, 156 S. W. 160. In the Kentucky case the Treasurer of Jefferson County desired to deposit the public funds in a bank. The guaranty company became surety on a bond given to the Treasurer by the bank, and the bank deposited with the guaranty company $100,000 of its assets. In said case the Court held such deposit illegal and void as being against public policy, and that the bank had no implied power to do such act, and on page 165 the Court announced the rule that where, by a charter provision or statute, a bank is required to secure state, county, court or other deposits before it can receive such deposits, the security which the bank gives must be such as it can procure by personal endorsement or otherwise, which does not involve a pledge of its assets. The reasoning in this case is very applicable to the case at bar. The Illinois Legislature has provided that an Illinois bank, if it wishes to receive deposits of public moneys of a city under the Commission Form of Government Act, must give the city a bond, and we think the language of the Court in the above mentioned case, as found on pages 165 and 166 of the decision, is very applicable:

> "In other words, the Legislature evidently did not intend that the security of any depositor should be impaired in order that that of another might be increased. So the only reasonable construction that can be placed upon these statutes requiring certain public funds to be secured by the depository is that the

security that such depository shall give must be other than a pledge of its own assets.

"There is no statute requiring the deposits of the County Treasurer to be secured by the depository, and there is no express power under which the bank was authorized to secure him by a pledge of its assets; no necessity existed for its doing so, in order to enable it properly to conduct its business as a banking institution; hence, its attempt to do so was an act ultra vires and void."

It will further be noted that Section 51 of the Commission Form of Government Act above mentioned does not in any respect pretend to give the bank power to pledge its assets. Petitioners' contention that the Legislature by the enactment of section 51 impliedly authorized the bank to pledge its assets to the surety executing its bond is reading something into the statute which is not there, and petitioners' position is well answered in the Kentucky case above mentioned, where the Court, on page 164, says:

"Before a bank should be adjudged entitled to exercise any power not expressly given, it should be clearly established that such power is essential to the proper conduct of its business, and necessary to enable it properly to enjoy, use and carry out its express powers. When such test is applied to the claim of right, on the part of a bank, to prefer one of its depositors over another, it is apparent that the right should be denied. The exercise of such a power would necessarily be fraught with great possibilities for the perpetration of fraud, and would undoubtedly have a

tendency to destroy the faith of the depositing public in banking institutions.

"When a legislative act is susceptible of a dual construction, one of which secures equality and equity, and the other paves the way to the perpetration of fraud, no court would hesitate to adopt that construction insuring fair dealing."

Again, on page 41 of their brief, petitioners say that the Legislature was undoubtedly aware of the usual practice of individual as well as corporate sureties to demand and receive indemnity for the obligations they assumed. No evidence of this so-called practice is in the record, and we take issue with petitioners' statement that such is the practice. On the contrary, we submit that such is not the practice, and that practically all surety bonds are issued without the principal of the bond indemnifying the surety in any way.

The case of Divide County v. Baird, 212 N. W. (N. Dak.) 236, is very similar to the case at bar, in that the statute of North Dakota is very similar to the Illinois statute. In the Divide County case the County Board desired to deposit its funds in the bank. The bank furnished a bond and various securities of the bank were deposited. The bank became insolvent and suit was brought for the return of the securities. In the Divide County case the statute of North Dakota, with reference to deposits of public funds in banks, was as follows:

"All funds of public corporations shall be deposited in banks which have been duly designated as depositories of public funds; that no deposit shall be made (except in the Bank of North Dakota) until the depository shall furnish a bond * * * in an amount that shall, at least, equal the largest deposit that may at any time be in such depository."

The Court in this case held that the bank had no power to pledge its assets, and that any such pledge was illegal and void.

POINT IX.

The Receiver Had Power to Disaffirm the Ultra Vires Act of Pledging the Securities and Was Under No Obligation to Return the Deposit.

If the pledge of the assets in question was beyond the power of the bank, it was unlawful and void; and the Receiver is not estopped from disaffirming it and recovering the securities. In speaking of the right to disaffirm an ultra vires contract made by a corporation, the Supreme Court of Illinois, in the case of National Home Building Assn. v. The Home Savings Bank, 181 Ill. 35, on page 44, said:

"The powers delegated by the state to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations,

and cannot plead ignorance in avoidance of the defense."

Quoting from the case of Thomas v. West Jersey Railroad Company, 101 U. S. 71, the Supreme Court of Illinois, in the above-mentioned case, in reference to invoking the doctrine of estoppel, on page 45, said:

> "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law the stronger the claim to its enforcement in the courts."

In the case of Wood v. Imperial Irrigation District, 216 Calif. 748, 17 Pac. (2d) 128, the Supreme Court of California, in holding that the receiver of a bank had power to disaffirm the unlawful pledge of securities without returning the deposit, said:

> "Appellant complains somewhat bitterly, and probably not without color of moral justification, and invokes the doctrine of estoppel against said bank, based upon the stipulated fact that said bank solicited said deposits, and had it known that the bank could not have lawfully pledged its bonds it would not have made the deposits. It is also stipulated that the Superintendent of Banks was charged with knowledge that the pledged bonds were in possession of the district for more than two years, and he made no complaint as to its possession and claim. The difficulty with this proposition is that the rights of the deposi-

tors, innocent third parties, are involved in the transaction, and their protection is one of the first concerns of the law. Their rights are surely equal with those of the district, unless the statute has given a preference to said district, which was an actor in the transaction. If it acted under a mistake of law, its position should not be better than that of other depositors who were ignorant of the bank's approaching insolvency, as well as the attempt on the part of the district to secretly secure its deposits."

We think Judge Sparks, in the majority opinion in this case, concisely set forth the law, and we quote from him as follows:

"It does not appear to us as worthy of judicial approval that the secured depositor may take advantage of the ultra vires act of the bank and assert an estoppel grounded upon such act. It had no right in making the deposit to rely upon a preference in the form of an unlawful transfer of assets. Otherwise, both parties, bound to realize the illegality of the transfer, might, in the face of such unlawfulness, agree to make the transfer, saying each to the other, 'though the transfer is not authorized by law, yet we will make it and accomplish the desired result, despite its illegality, for neither may hereafter rescind without restoring the original status.' We do not approve of the accomplishment of an illegal result by way of any such unconscionable use of the doctrine of estoppel. We hold with the decisions in the case cited that the Receiver may repudiate the invalid pledge without returning the valid deposit, and that appellees must

share with the other general depositors in the distribution of the bank's assets."

The following cases likewise support our contention that the Receiver was authorized to disaffirm the ultra vires pledge: Baltimore and Ohio Railroad Co. v. Smith, 56 Fed. (2d) 799; Austin v. Lamar, 26 S. W. (2d) 1062; Calumet etc. Dock Co. v. Conkling, 273 Ill. 318; Farmers and Merchants State Bank v. Consolidated School District, 219 N. W. 163.

It is suggested in the case of State Bank of Commerce v. Stone, 261 N. Y. 175, 184 N. E. 750, that the remedy lies in examinations by the administrative officers in charge of banks. In the very nature of things pledges of assets for deposits are more likely to be demanded at a time when the banks are in failing circumstances and they are more likely to accede to such demands at such times because of their need of funds. Examinations can be made only at intervals and if the bank is in failing circumstances it is a matter of common knowledge that deposits may be secured by pledges and the banks closed before an examination is made. Further, the very demand by examining officials that a failing bank return all deposits secured and regain the pledged assets, might, because of the bank's depleted cash position, force the bank to close, leaving the assets still pledged. In the case at bar the deposits were made and the collateral pledged between the 25th of August, 1931, and the 21st of October, 1931, on which last-

mentioned day the bank closed. Thus, less than sixty days intervened between the delivery of the collateral and the closing of the bank. Cases are rising in courts throughout the nation on violations of banking laws, both civil and criminal, by officers of banks, and such violations were not prevented by examinations.

In petitioners' brief, it is contended that if petitioners are permitted to retain the benefits of the collateral pledged, the general creditors of the City National Bank of Herrin have suffered no injury. It is stated that such creditors have been benefited to the extent of the deposits made in that there remains in the assets of the bank cash in the amount of such deposits, which cash would not be there for their benefit if the deposits had not been made and the collateral pledged. Such theory, viewed in the light of facts surrounding the closing of banks in the trying period through which we have been passing, is untenable. During the past few years knowledge of the manner of closing of banks has been impressed upon everyone having any dealings with such institutions. Depositors, losing confidence, start making withdrawals. As the amounts of such withdrawals become alarming, banks eagerly seek cash by sale of assets, borrowing and solicitation of deposits. The demands of withdrawing depositors usually are met as long as there is cash available, and, in most cases, the banks remain open as long as there appears to be sufficient cash with which to settle immediate demands. Deposits made during such "runs" are not used by the

banks in granting loans or in purchasing securities, but are used to discharge the obligations of withdrawing depositors. When the cash of the bank is thus depleted the bank closes. Consequently, the deposits made during such period do not remain among the assets of the bank, but have been dissipated in paying the obligations to other depositors and, in so far as the remaining depositors are concerned, the only benefit derived by them from such deposits is that the obligation of the bank to some other depositor, or depositors, has been discharged. In terms of money benefit to the remaining creditors of the bank, this means that the assets of the bank in the hands of the receiver are not chargeable with dividend payments to the withdrawing depositors whose claims have been satisfied by the cash placed in the bank by the late depositors. If one of those late depositors is secured by pledge of assets, as in the case at bar, and is permitted to retain those assets, the result is that such collateral is lost to the general creditors and their benefit is measured by the dividends which would have been paid to the withdrawing depositor whose claim was paid by the deposit of the secured creditor. It is exactly this benefit which the respondent offers to restore to the petitioners.

Petitioners take the position that the burden is upon respondent to show that the City National Bank of Herrin **did not** have the power to pledge the securities in question. We insist the burden is upon petitioners to show that the bank **did have** the power, as is stated by Justice Baldwin

in his dissenting opinion in the case of United States v. Robertson, 5 Pet. (U. S.) 641, where he says:

> "The injured creditors are not bound to show a negative of the power by any restrictions or prohibitions. It is an universal principle, that he who claims under a special authority must show its existence and lawful exercise: to throw the burthen of proof on the party whose rights will be destroyed by its abuse, would be the utter reversal of every rule which governs * * *."

CITY OF CHICAGO AS AMICUS CURIAE.

We have read with a great deal of interest the matters called to the attention of this Court by the City of Chicago, as amicus curiae. While the condition of the City of Chicago may be of great general interest, we respectfully submit that such matters are not contained in the record and are not properly before this Court in the determination of the issues involved in this case.

Respondent respectfully submits that the decree of the Circuit Court of Appeals should be affirmed.

HOSEA V. FERRELL,
JOHN HAY,
Counsel for Respondent.

FILE COPY

Supreme Court of the United States

October Term, 1941

No. 400

CITY OF MORTON, ILLINOIS, a Municipal Corporation, et al.,

Petitioners,

vs.

BEN RANDOLPH, *as Receiver of the* CITY NATIONAL BANK OF MORTON, ILLINOIS,

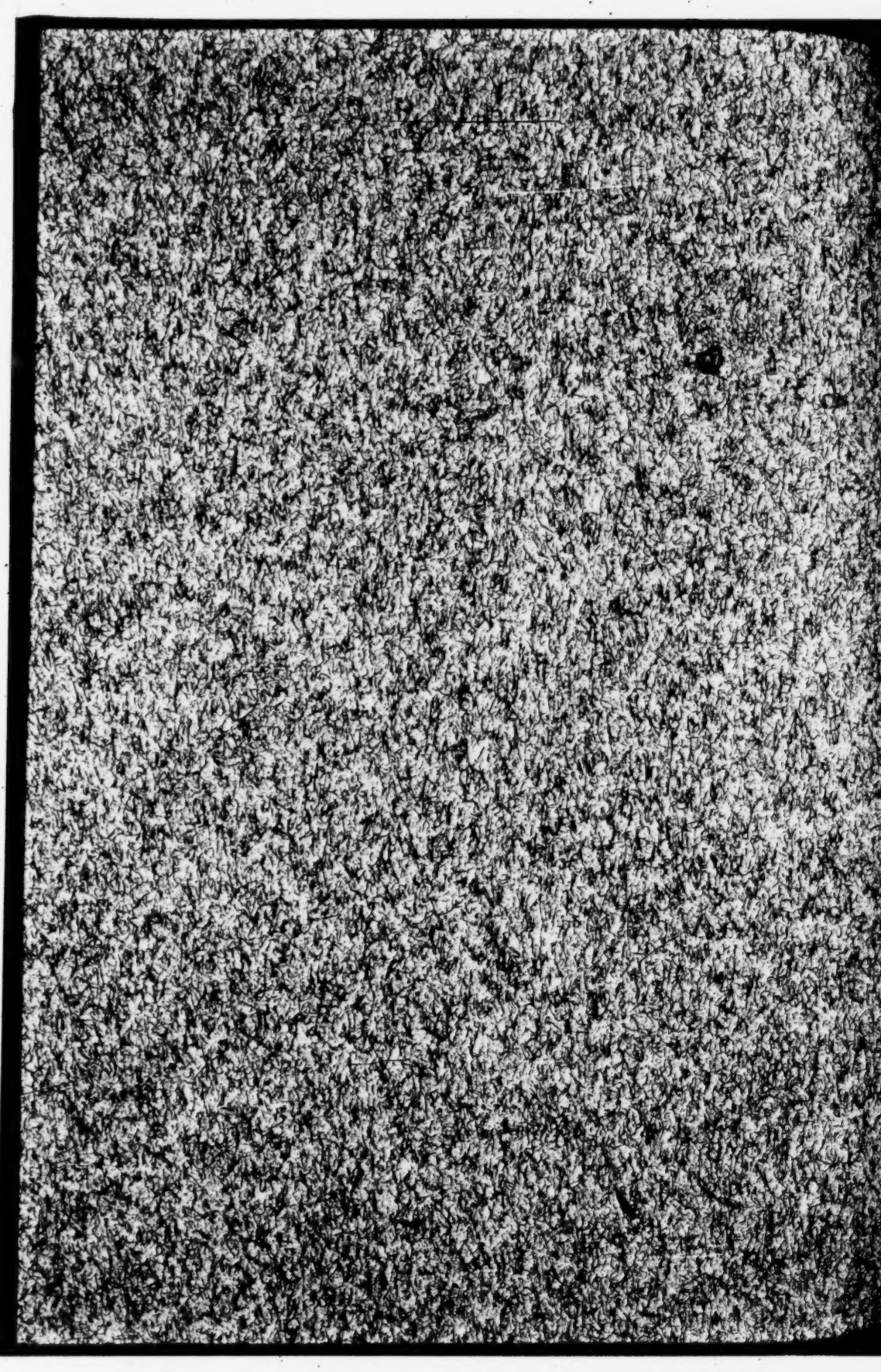
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS

WILLIAM CATTRON RIGBY,
Colonel, Judge Advocate,
FRED W. SHAW, JR.,
Major, Judge Advocate,
Attorneys for The People of the Philippine Islands.

SAMUEL P. HILLARD,
ROBERT PRESCOTT, JR.,
Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, *a Municipal Corporation, et al,*
Petitioners,

vs.

BEN SNEEDEN *as Receiver of the* CITY NATIONAL BANK OF HERRIN, ILLINOIS,
Respondent.

BRIEF OF AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS

INTRODUCTION

The undersigned, William Cattron Rigby and Fred W. Llewellyn, attorneys for the People of the Philippine Islands, being thereunto duly authorized and instructed by direction of the Governor-General of the Philippine Islands, appear herein as *amici curiae*, and present this brief on behalf of the People of the Philippine Islands.

The parties of record on both sides have consented to such appearance, the petitioners, through their counsel verbally, and the respondent, through the Comptroller of the Currency of the United States, as evidenced by a letter from the latter to the Secretary of War, dated August 21, 1933, a copy of which is hereunto appended (Appendix I, *infra*, pp. 9-10).

PURPOSE OF THIS BRIEF

This brief is presented to show more fully the far reaching importance of the basic question presented, especially to the

People of the Philippine Islands, and to bring to the attention of this Court important reasons, in addition to those urged by the petitioners, for the granting of the writ and for the reversal of the judgment of the Circuit Court of Appeals for the Seventh Circuit. More specifically this brief is submitted because:

(1) This cause presents the question whether state and national banks, empowered by law to receive deposits and to do a general banking business, have implied power to pledge their assets to secure deposits of public funds;

(2) The People of the Philippine Islands, always understanding that such banks had such power, has for more than twenty years maintained large amounts of its public funds on deposit in national and state banks within the continental United States, each deposit secured by pledge of equivalent collateral, and such deposits and pledges now aggregate approximately $63,000,000, distributed among 34 national and 13 state banks;

(3) The opinion and judgment of the United States Circuit Court of Appeals in this cause, holding in substance that state and national banks in Illinois are without such power, is, for the reasons set forth below, as well as those presented in the petition and supporting brief already on file, clearly erroneous, and tends to establish an important judicial precedent, which, if undisturbed, will erroneously and unjustly prejudice the interests of the People of the Philippine Islands, by casting serious doubt upon the validity of the pledges by which its deposits above mentioned are secured, thus wrongly jeopardizing the security of those deposits; and

(4) The Federal and insular statutes authorizing, and circumstances surrounding, the adoption and maintenance by the People of the Philippine Islands, of the practice of requiring this form of security for deposits of its public funds in state and national banks of the United States, more fully set forth below, disclose a long-standing tacit recognition by the Congress of the existence of the questioned power, and

constitute substantial grounds, in addition to those urged in the petition and brief heretofore filed herein, for the granting of the writ, and for reversal by this Court of the judgment of the Circuit Court of Appeals in this cause.

STATEMENT

The Philippine Islands comprise a self-governing territorial possession and dependency of the United States, with a population of about 12,000,000 people, whose insular government was established and is maintained under and pursuant to certain organic statutes enacted by the Congress of the United States, of which those still in force are compiled in the United States Code and its supplements as Chapter 5 of Title 48.

Under the said organic statutes the insular government of the Philippine Islands is authorized to issue and has issued negotiable bonds and notes, and is authorized to have and maintain and does have and maintain a separate local system of coinage and currency for the use and benefit of the inhabitants of those Islands; and is further authorized to adopt such measures as it may deem proper not inconsistent with said organic statutes to maintain the parity of value of the said bonds, notes, coinage and currency (48 USC 1141-1156).

By the Act of Congress approved July 1, 1902 (32 Stat. 691), establishing a civil government for the Philippine Islands, the legislative power of that government was vested in the Philippine Commission, which later, under other Acts, including the Act of Congress approved August 29, 1916 (39 Stat. 545), was succeeded by the Philippine Legislature. By Section 86 of the said Act of July 1, 1902 (32 Stat. 712), it was provided that:

> All laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same.

A similar provision with respect to laws passed by the Philippine Legislature was carried by the said Act of Aug-

ust 29, 1916, in Section 19 thereof (39 Stat. 551), the latter provision being still in effect (48 USC 1054), and the Act last mentioned also contained provision continuing in effect the laws in force in the Philippines to the date of its enactment, except as altered, amended or modified by that Act, until altered, amended or repealed by the Congress or the Philippine Legislature (39 Stat. 547; 48 USC 1004).

Meanwhile, the Philippine Commission, on October 12, 1907, enacted its Act No. 1792, of which Section 38 (Sec. 596, Compilation of Acts of the Philippine Commission, 1908) embodied provisions for the designation of depositaries of public funds of the Philippine Islands, in all respects substantially like those contained in the now existing Philippine law (Sec. 625, Revised Administrative Code of the Philippine Islands, 1917) as follows:

> The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular Affairs, at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him.

Other pertinent provisions of the Revised Administrative Code of 1917, found in Sections 1603-1605, 1622, 1623, 1625 and 1626, are quoted in Appendix II, *infra*, pp. 11-14.

The Revised Administrative Code of 1917, as enacted by the Philippine Legislature in its Act No. 2711, containing the section above quoted, as well as the other provisions cited, was submitted to the Congress by the President as an inclosure to his letter dated December 7, 1917. It may fairly be presumed that insular Act No. 1792 of October 12, 1907,

supra, wherein these provisions were in substance originally enacted, was similarly reported to the Congress, as required by Sec. 86 of the Act of July 1, 1902, *supra*. The Congress has never altered, amended or modified the said Revised Administrative Code in any respect and those provisions thereof above mentioned continue to constitute the insular law governing the conduct of the War Department and the Philippine Government with relation to the designation and employment of depositaries of public funds of that Government.

Under and pursuant to the above mentioned provisions of the Insular Administrative Code, the Secretary of War has from time to time designated certain state and national banks within the continental limits of the United States as depositaries for funds of the Philippine Government and people, the Governor-General of the Philippine Islands has designated the same banks as branches of the insular Treasury, and the Treasurer of the Philippine Islands has placed and kept on deposit therein large amounts of the public funds of the People of the Philippine Islands, for the purpose of maintaining the parity of Philippine bonds, notes, coinage and currency. As above stated the total amount of such deposits in the United States now approximates $63,000,000, and these deposits are distributed among 34 national banks and 13 state banks.

As prescribed by the same laws each depositary bank has been required to deposit, and has deposited, with or to the order of the Chief of the Bureau of Insular Affairs, War Department, collateral security of a value equivalent to the amount of the deposit, in each instance under a formal pledge agreement in writing, authorizing recourse by the pledgee to the pledged collateral in the event of a failure to repay the amount of the deposit.

This practice has been followed uniformly since about the year 1908, during all of which period the national banks so employed as depositaries have been periodically examined by the official representatives of the Comptroller of the Cur-

rency, as required by law, without any objection to the practice having been made by that executive.

Meanwhile, as the undersigned are informed and believe, substantially the same practice has for a long time been followed very generally by both national and state banks throughout the United States, with relation to other deposits of public funds, and perhaps a majority of such banks are now carrying such deposits, secured by pledges of collateral, where there is no express statutory authority for such security, believing that their general statutory powers imply incidental power to make such pledges.

ARGUMENT

Thus it appears that for a period of about twenty-five years Philippine statutes have expressly authorized and required the practice of taking pledges of collateral to secure deposits of public funds of the Philippine Islands made in both state and national banks within the United States. It further appears that those insular statutes, soon after their original enactment, were officially reported to the Congress, and that the Congress has never seen fit to exercise its expressly reserved right to repeal or amend them.

Meanwhile the Comptroller of the Currency, who is the official directly charged with the administration of the national banking laws, has uniformly held that national banks are legally empowered to pledge their assets to secure deposits of public funds (Petition, pp. 11, 23), and, although necessarily aware of the practice above described, has allowed it to continue with his tacit approval.

We conclude, as far as national banks are concerned, that the practice prescribed by the insular statutes has always had the tacit approval of both the Congress and the executive department immediately charged with administration of the national banking laws. In short, the national banking laws for nearly a generation have been tacitly construed by both the legislative and executive branches of the Government, to per-

mit that practice, and therefore to confer upon national banks implied power to pledge assets for the security of deposits of public funds. Only the clearest evidence of a contrary intent, deducible from the pertinent statutes, would justify the courts in disturbing that construction. We have been unable to discern any such evidence.

CONCLUSION

Other phases of the case have been ably covered in the petition and supporting brief, and in the well reasoned dissenting opinion of JUDGE ALSCHULER of the Circuit Court of Appeals. An opinion of the United States Circuit Court of Appeals for the Tenth Circuit, rendered August 12, 1933, dealing with issues somewhat similar to those here involved, is quoted for the convenience of the Court in Appendix III, *infra*, pp. 15-21.

The writ should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Colonel, Judge Advocate,
FRED W. LLEWELLYN,
Major, Judge Advocate,
Attorneys for The People of the Philippine Islands.

SERAFIN P. HILADO,
Solicitor General of the Philippine Islands,
KYLE RUCKER,
Acting The Judge Advocate General,
Of Counsel.

APPENDIX I

TREASURY DEPARTMENT
WASHINGTON

Comptroller of the Currency

August 21, 1933.

The Honorable,
The Secretary of War.

Sir:

Receipt is acknowledged of your letter of August 16th discussing the interest of the War Department, as custodian of Philippine Government funds, in the recent decision of the United States Circuit Court of Appeals, Seventh Circuit in the case of *Sneeden, Receiver of the City National Bank of Herrin, Illinois* v. *City of Marion, Illinois,* reported in 64 Fed. (2nd) 721. Counsel for the City of Marion is preparing to file a petition for writ of certiorari in this case in the Supreme Court of the United States and the Philippine Government has authorized officers of the Judge Advocate General's Office of the War Department to appear in its behalf, as *amicus curiae,* in support of the petition. You ask whether the Comptroller of the Currency, the Receiver or his counsel will have any objection to such appearance.

The Comptroller of the Currency in his capacity as trustee for the general creditors of the City National Bank of Herrin directed his agent, the Receiver, to file this action in the United States District Court and to take an appeal to the United States Circuit Court of Appeals. The Comptroller, in his capacity as trustee for the creditors of this particular bank, the Receiver and his counsel are content to accept as final the decision of the United States Circuit Court of Appeals, favorable to the general creditors. However, the Comptroller of the Currency, in charge of the affairs of more than 2,000 closed National banks, is very desirous of having the law concerning the power of National banks to pledge assets for public deposits definitely settled by the Supreme Court of

the United States. Accordingly, neither the Comptroller of the Currency nor his agent, the Receiver, nor the Receiver's counsel have any objection to representatives of the Philippine Government or the War Department appearing in this case as amicus curiae.

The Receiver of the City National Bank of Herrin, is being instructed today to accept the decision of the United States Circuit Court of Appeals as final and to instruct his counsel not to file a brief in the United States Supreme Court against the petition for writ of certiorari. Of course if certiorari is granted counsel for the Receiver will appear on the merits. This office will be pleased to cooperate in this matter with the representatives of the Judge Advocate General's Office concerned, to the fullest extent possible under the circumstances.

Yours very truly,

(Signed) J. F. T. O'CONNOR,

Comptroller of the Currency.

APPENDIX II

Extracts from the Revised Administrative Code of the Philippine Islands

(Act No. 2711, approved March 10, 1917)

Sec. 625 (*supra*, p. 4).

Sec. 1603 (as amended by Act No. 3519, Feb. 20, 1929).

Functions of Bureau of Treasury.—The Bureau of the Treasury shall be charged with the safekeeping of governmental funds, the supervision of the currency, and generally with the administration of the laws of the United States and of the Philippine Islands relating to coinage and currency in said Islands, and any other laws or parts of laws that may be expressly placed within its jurisdiction.

Sec. 1604. *Treasurer as custodian of governmental funds.*—The Insular Treasurer shall receive for safekeeping all funds which by law may be covered into the Insular Treasury or deposited therein, whether revenues and receipts of the Government or trust and depositary funds either of the Government of the Philippine Islands or of the United States. He shall likewise receive special deposits of money or securities from individuals in connection with or relating to governmental transactions.

Sec. 1605. *Branches of Philippine Treasury in United States.*—The Governor-General may in his discretion designate such depositaries of the Philippine Government in the United States as he may deem advisable to be branches of the Philippine Treasury.

* * * * * * * * * *

ARTICLE VI.—*"Gold Standard Fund".*

Sec. 1622. *How constituted.*—There is hereby constituted in the Insular Treasury a separate and trust fund, designated as the "Gold Standard Fund", which shall at all times be maintained in a sum not less than fifteen per centum of the money of the Government of the Philippine Islands in circu-

lation and available for circulation, including both coin and Treasury certificates. If at any time and for any reason said fund shall fall below the minimum hereinabove fixed, the deficiency shall be made up out of any funds then in the Insular Treasury or thereafter paid into the Treasury, not specifically appropriated to meet the payment of the principal, sinking fund, or interest of the public debt, and such amount shall be considered as automatically appropriated for this purpose, and the Insular Treasurer is hereby authorized and directed to transfer the necessary amount to the "Gold Standard Fund" to make good any such deficiency therein.

* * * * * * * * * *

Such fund shall not be used to pay any of the expenses of the Government of the Philippine Islands or to satisfy any of the appropriations of said Government except only such expenses as follows:

(*a*) Those connected with the purchase of bullion, the coinage of the same into money of the Philippine Islands, and those expenses which are incidental to such coinage;

(*b*) Those connected with the putting of the money into circulation, including the prepartion, issue, and destruction of treasury certificates, and including additional compensation to the members of the committee provided for in section sixteen hundred and twenty-five, paragraph (*g*) of this Act;

(*c*) Those connected with the carrying on of such transactions, by exchange or otherwise, as may be authorized by law to maintain the circulation of the currency of the Philippine Islands, and to maintain the parity of value between the gold standard peso and Philippine silver peso and subsidiary and minor coins.

Sec. 1623. *How held.*—The "Gold Standard Fund" shall be held in the vaults of the Insular Treasury in Manila or may in part be held in the form of deposits with such Federal Reserve Banks or member banks of the Federal Reserve System in the United States as may be designated from time to

time by the Governor-General to be branches of the Philippine Treasury for receiving such deposits: * * *.

Philippine silver coin in the "Gold Standard Fund" may at any time be exchanged by the Insular Treasurer for an equivalent amount, at par of gold on deposit in the United States in the "Treasury Certificate Fund."

* * * * * * * * * *

ARTICLE VII.—*Issuance of treasury certificates and maintenance of fund to protect the same.*

Sec. 1625. *Manner in which treasury certificates are to be dealt with.* * * *

Sec. 1626. *Issuance of treasury certificates.*—The Treasurer of the Philippine Islnads is hereby authorized, in his discretion, to receive at the Insular Treasury or at any of its branches, deposits of silver pesos or half pesos authorized herein, in sums of not less than twenty pesos, and to issue therefor treasury certificates of an equivalent face amount, in denominations of not less than one peso, nor more than five hundred pesos. Coin so received shall be retained in the Treasury and held for the payment of such certificates, on demand, and used for no other purpose, and shall constitute a separate and trust fund in the Insular Treasury, to be known as the "Treasury Certificate Fund."

The "Treasury Certificate Fund" shall at all times be equivalent in amount to one hundred per centum of all treasury certificates in circulation and available for circulation, and shall be constituted of silver coins received in exchange for the treasury certificates, and shall be held in the vaults of the Insular Treasury in Manila, and not elsewhere: *Provided, however,* That when the Government's supply of silver coin is insufficient to meet the demands of trade, gold coin of the United States may be substituted temporarily for silver pesos in the fund to such an extent as may be found necessary to release silver coins for circulation, pending the purchase of silver bullion for the coinage of silver coins, which silver coins

shall immediately be substituted for the gold placed in the fund: *And provided, further,* That as first set up and established by the provisions of this Act and until such time as the Governor-General in writing may direct the purchase of silver bullion for the coinage of additional silver coins, the "Treasury Certificate Fund" instead of being constituted wholly of silver coins held in the vaults of the Insular Treasury in Manila, may be constituted in part of currency issued by and or under the authority of the United States held in Manila and on deposit with such Federal Reserve Banks or member banks of the Federal Reserve System in the United States as may from time to time be designated by the Governor-General to be branches of the Philippine Treasury for receiving such deposits.

* * * * * * * * * *

APPENDIX III

United States Circuit Court of Appeals

TENTH CIRCUIT

No. 809

APRIL TERM, 1933

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and JAMES W. WORRALL,

Appellants,

v.

F. L. KOKRDA, *as Receiver of the First National Bank of Deer Trail,*

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

(August 12, 1933)

L. Ward Bannister (Thos. A. Mapes and Samuel M. January were with him on the brief) for appellants.
Archibald A. Lee for appellee.

Before PHILLIPS and MCDERMOTT, Circuit Judges, and KENNEDY, District Judge.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

Worrall was the duly elected and qualified treasurer of Elbert County, Colorado, for the term beginning January 1, 1931, and ending January 1, 1933. The Fidelity & Deposit

Company, hereinafter called the surety company, was the surety on his official bond. On January 9, 1931, the surety company and the First National Bank of Deer Trail entered into a contract of pledge, the material portions of which are set out in Note 1.

On October 13, 1931, Kokrda was duly appointed receiver of the bank by the Comptroller of the Currency. Thereafter such receiver brought this action and alleged that the bank was the owner of four federal land bank bonds of the face value of $1,000 each, and that on January 9, 1931, the surety company wrongfully took possession of such bonds and has since wrongfully and unlawfully detained them. He sought recovery of the bonds or their value, and damages for their unlawful detention.

The surety company filed an amended answer, and Worrall filed a petition in intervention in which they alleged: That Worrall was the treasurer of Elbert County; that the surety

---

NOTE 1.

"Whereas, James W. Worrall, has been duly elected Treasurer of Elbert County in the State of Colorado, and as such Treasurer at the special instance and request of the First National Bank of Deer Trail, Colorado, and on the security hereinafter described, has deposited or may hereafter from time to time deposit certain moneys with the First National Bank of Deer Trail, Colorado, in regular course of business which deposits will be evidenced by demand certificates of deposit in customary form.

"And, Whereas, said First National Bank of Deer Trail, Colorado, has delivered to the Fidelity and Deposit Company of Maryland the following described bonds. . . . (Here follows a detailed description of the bonds involved herein.)

"Now, Therefore, if the First National Bank of Deer Trail shall promptly pay to the said James W. Worrall or his order, upon demand in regular course of business, all moneys which have been or shall hereafter be deposited with said First National Bank of Deer Trail as aforesaid, by or on behalf of the said James W. Worrall, County Treasurer; and shall keep and hold harmless the said James W. Worrall as well as the Fidelity and Deposit Company of Maryland as surety on James W. Worrall's official bond, of, and from all loss or damages which may arise or accrue to the said James W. Worrall or the Fidelity and Deposit Company by reason of the deposit or delivery of said funds, or any part thereof, . . . then this obligation to be void, otherwise to remain in full force and virtue.

"This receipt is issued in duplicate, the duplicate to be held by the Fidelity and Deposit Company of Maryland, as security on the official bond of James W. Worrall, Treasurer of Elbert County and the original to be held by the First National Bank of Deer Trail . . . ."

company was surety on Worrall's official bond; that Worrall, during his term of office, kept certain public moneys on deposit in the bank, and in order to protect Worrall, and with the knowledge and consent of Worrall, the bank executed such contract of pledge and delivered the bonds to the surety company; that on October 13, 1931, the bank became insolvent and closed its doors; that on that date there was on deposit in the bank public funds of Elbert County in the sum of $3,764.88, together with accrued interest of $40.00; and that demand was made upon the bank and upon the receiver for the payment of such deposit, and the same refused.

The trial court sustained demurrers to the amended answer and petition in intervention. The surety company and Worrall elected not to plead further. The trial court rendered judgment in favor of the receiver for the return of the bonds and for damages.

The Act of June 25, 1930 (46 Stat. 809), Sec. 90, Title 12, U. S. C. A., in part reads as follows:

> "Any association may, upon the deposit with it of public money of any state or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

Sec. 1, Chap. 83, Colo. S. L., 1927, provides that each county treasurer shall deposit all public funds coming into his possession "in one or more responsible banks located in . . . Colorado"; that before making such deposits the treasurer may take from said bank or banks a bond conditioned that such deposits shall be promptly paid on the check or draft of the treasurer; that such depository bank may give in lieu of such depository bond certain kinds of bonds or other interest-bearing securities including "farm loan bonds issued by any Federal bank or joint stock land bank, . . . to be held by such

treasurer as security for the prompt payment of such deposit or deposits"; that such bonds or securities given in lieu of a depository bond shall be deposited in the custody of some national bank in Colorado, or in a bank or trust company, doing business under the laws of Colorado, under an escrow agreement executed in triplicate by the treasurer, the depository bank, and the escrow holder, to the effect that such securities shall be held and safely kept by such escrow holder as security for the prompt payment of such deposits on the check or draft of the treasurer; and that one copy of such escrow agreement shall be kept by the depository bank, one by the county treasurer, and one by the escrow holder.

The contract of pledge in the instant case was not entered into between the bank and Worrall as treasurer, but it was entered into for his express benefit. The surety company was made the escrow agent, instead of a national bank located in Colorado, or a state bank or trust company. The contract was not entered into in triplicate, and a copy thereof was not delivered to the treasurer. Except as above indicated, the pledge of collateral security complied with Chap. 83, supra.

Counsel for the receiver contends that, since the pledge was not made in strict accord with Chap. 83, supra, it was unauthorized by the provisions of Sec. 90, supra, and that the receiver was entitled to recover such bonds without first accounting to the treausrer for the county moneys deposited with the bank.

Sec. 90, supra, does not say a national bank may give security in the same *manner*, but that it may give security of the same *kind* as a state bank may give. *Kind* means class; character, sort, description. Webster's New International Dictionary. Had Congress intended to limit the manner of giving the security, we think it would have said, "of the same kind and in the same manner", or used words of equivalent import. The plain purpose of the statute was to remove any doubt of the power of national banks to give security for public deposits, and in that respect to enable them to invite public

deposits on an equal footing with state banks. *Baltimore & O. R. Co.* v. *Smith* (C. C. A. 3) 56 F. (2d) 799, 802. It is our opinion that it authorizes a national bank to give the same kind of security for public deposits as state banks are authorized to give, in a state in which such national bank is situated, and leaves to state law the question of the procedure to be followed in the giving of such security. But if it authorizes a national bank to give security for public deposits only in compliance with the provisions of state law, the power existed to pledge the bonds, and the only question is, whether there was such a substantial compliance with Chap. 83, supra, as would bind the bank.

An examination of the cases relied on by counsel for the receiver has led us to the conclusion that many of them are distinguishable from, and do not control the instant case. For example: In *Sneeden* v. *City of Marion* (C. C. A. 7) 64 F. (2d) 721, the court said:

> "Section 316, c. 24, Smith-Hurd Rev. St. Ill. 1931, and paragraph 374, supra, expressly provides that before any Illinois bank may receive a deposit of public funds, of the kind herein described, it shall execute a bond with sureties approved by the president of the city council, as security for the return of the money deposited; and it is not authorized to give, nor is the treasurer authorized to accept, other security."

There, the bank was not authorized to secure the deposit by securities which it undertook to pledge for that purpose. It was authorized to secure the deposit only by a surety bond. Here, the bank was expressly authorized to pledge the bonds, but failed to do so in exact accord with the statute. In *Parks* v. *Knapp* (C. C. A. 8) 29 F. (2d) 547, the sureties on the depository bond undertook to hold the collateral pledged to protect themselves. Here, the appellants are undertaking to hold the pledged collateral to protect the county, for whose benefit the bank had express power to make the pledge. *Texas & P. R. Co.* v. *Pottorff* (C. C. A. 5) 63 F. (2d) 1, concerned a

private deposit, and a dictum therein, as we shall presently show, sustains the contention of appellants.

While there are decisions to the contrary, the rule supported by many well reasoned decisions is that where the legislature of a state has declared by express statutory enactment that deposits of public funds shall be secured, thereby indicating that the public policy of the state is not only to permit, but to require the securing of such deposits, contracts to secure such deposits, made in good faith, should be sustained, although not entered into in exact accord with the statutory requirements.

In *Texas & P. Ry. Co.* v. *Pottorff, supra,* the court said:

> "Cases, and these are supported, we think, by the better reasons, holding that, where the Legislature of a state has declared in specific statutes that deposits of public money must be secured this sufficiently indicates the public policy of the state towards the securing of public deposits, to sustain contracts whether in exact accordance with the statute or not, made in good faith for their security, are, *First Am. Bank & Trust Co.* v. *Palm Beach,* 96 Fla. 247, 117 So. 900, 67 A. L. R. 1398, 1400; *Melaven* v. *Hunker,* 35 N. M. 408, 299 P. 1075; *Cameron* v. *Christy,* 286 Pa. 405, 133 A. 551; *McFerson* v. *Nat. Surety Co.,* 72 Colo. 482, 212 P. 489; c/f Michie Banks & Banking, Vol. 4, p. 22, Sec. 19."

The treasurer deposited the public moneys in the bank. It was the duty of the bank to give security therefor in accordance with the provisions of Chap. 83, supra. This it undertook to do by pledging proper securities and depositing them with the surety company, instead of with an authorized bank. Under these circumstances we are of the opinion that the bank is bound by the pledge and cannot defeat it by setting up that it did not pledge the bonds in strict compliance with the statute. *Schornick* v. *Butler,* .... Ind. ...., 185 N. E. 111, 112; *Melaven* v. *Hunker,* 35 N. M. 408, 299 P. 1075; *Williams* v. *Earhart,* .... Ariz. ...., 273 P. 728.

Furthermore, the bank has not returned the deposit. When it received the deposit, it was its duty to secure the same in the manner provided in the statute. Under such circumstances it ought not to be permitted to recover the security without returning the deposit. *Schornick* v. *Butler, supra; State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750, 754; *Melaven* v. *Hunker, supra.*

REVERSED and REMANDED with instructions to overrule the demurrers.

A true copy.

Attest:

ALBERT TREGO,

(SEAL)

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

FILE COPY

Office Supreme Court, U. S.
FILED
DEC 7 1933
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, *a Municipal Corporation, et al.*,
Petitioners,

vs.

BEN SNEEDEN, *as Receiver of the* CITY NATIONAL BANK OF HERRIN, ILLINOIS,
Respondent.

SUPPLEMENTAL SUGGESTIONS BY AMICI CURIAE ON BEHALF OF THE PHILIPPINE ISLANDS

1. The primary question is of the meaning of the grant by the Congress to national banks of

> "all such *incidental powers* as shall be necessary to carry on the business of banking * * * receiving deposits,"

in Section 8 of the National Banking Act of June 3, 1864, c. 106, 13 Stat. 99, 101; Rev. Stat., Sec. 5136. Do such "incidental powers" include the power to pledge assets as security for deposits,—specifically for public deposits?

This is not a new statute; it has been in force, unchanged, for almost seventy years. Its meaning does not change with the advent of new theories of public policy. If there be need for change, that is for the legislative authority, not for the courts.

The question demands an *historical inquiry. What was the sense in which the Congress used this phrase when it enacted the statute seventy years ago, in 1864?* What were the "incidental powers" then generally understood as "nec-

essary to carry on the business of banking * * * receiving deposits"? Because, of course, the Congress will be presumed to have used the words in their ordinary meaning, as then generally understood.

To arrive at the "ordinary meaning" of the phrase at that time,—what may be called its "dictionary meaning", —recourse must be had to the same methods by which a lexicographer determines the meaning of words. He collates and quotes uses of the word or phrase in current writings; inquires as to its use and meaning in ordinary day to day speech. But where, as here, the question is of the meaning of the word or phrase, as it was used in a particular document some seventy years ago, there he must turn to its use in writings of the period.

Applying a similar lexicographer's method here, we may have recourse to: (1) Prior decisions of the courts defining or illustrating the "incidental powers" of banks which may be presumed to have been in the contemplation of the Congress when the statute was enacted; (2) Text writers; (3) Subsequent legislative interpretations of this statute by the Congress itself, by the legislatures of Territories under the control of the Congress, and by State legislatures; and (4) Administrative interpretations by officials charged with its administration, particularly by the Comptroller of the Currency.

Looking to these sources we find: (1) In the only reported court decisions in which the question appears to have been considered prior to 1864, this court and also the Court of Appeals of the State of New York, had indicated that such a power as that here in question to pledge assets as security for public deposits was included among the bank's "incidental powers"[1]; (2) No text writer prior to 1864, nor for more than fifty years afterwards, appears even to have questioned this power,—indeed, in a standard work,

[1] *United States* v. *Robertson*, 5 Pet. (30 U. S.) 641 (MARSHALL C.J.; 1831). *Planters Bank* v. *Sharp*, 6 How. (47 U. S.) 300 (WOODBURY J.; 1848). *Smith* v. *Lansing*, 22 N. Y. 520 (1860).

Morse on Banks and Banking, it is said as late as 1917, in the 5th edition (*Carter's*), without qualification, that (Section 48, p. 122, under heading "Deposits"):

> "A bank may receive special, specific, *and general deposits, and give security for them.*" (Italics supplied.)

(3) The Congress itself[2], Territorial legislatures[3], and the legislatures of a great majority of the States of the Union[4], have enacted statutes indicating their understanding that the power here in question is included among the incidental powers of a bank, and their understanding that it was intended by the Congress to be included in the "incidental powers" granted by this Section 8 of the National Bank Act of 1864; and (4) The Comptroller of the Currency appears uniformly to have so held[5].

No suggestion to the contrary appears ever to have been made for more than fifty years after the enactment of the National Banking Act of 1864, or until the Kentucky case

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[2] Section 45 of the same Act of 1864; and various other acts requiring depositing authorities to take collateral security for various kinds of public deposits, e. g. "Federal Reserve Act" of December 23, 1913, c. 6, Section 9, as amended by Act of May 7, 1928, c. 507, 45 Stat. 492; act regulating postal savings funds deposits, August 24, 1912, c. 387, Sec. 1, 37 Stat. 512, and Act of May 18, 1916, c. 126, Sec. 2, 39 Stat. 159; acts regulating deposits of funds of Indians, March 3, 1911, c. 210, Sec. 17, 36 Stat. 1070, and May 24, 1918, c. 86, Sec. 28, 40 Stat. 591; deposits of proceeds from sales of Liberty bonds, certificates of indebtedness and war savings certificates, September 24, 1917, c. 56, Sec. 8, 40 Stat. 291; October 3, 1917, c. 63, Sec. 214, 40 Stat. 308; April 4, 1918, c. 44, Sec. 5, 40 Stat. 504; Federal Farm Loan Act, July 17, 1916, c. 245, Sec. 6, 39 Stat. 365; deposits of money of bankrupt estates, Act of July 1, 1898, c. 541, Sec. 61, 30 Stat. 562; deposits of certain securities in lieu of surety bonds, Act of February 24, 1919, c. 18, Sec. 1320, 40 Stat. 1148, as amended by Act of November 23, 1921, c. 136, Sec. 1329, 42 Stat. 318; Act of June 2, 1924, c. 234, Secs. 2 and 1029, 43 Stat. 253, 349.

[3] *Philippine Islands,* Act No. 1792 of the Philippine Com-

in 1913 (*Commercial Bank & Trust Co.* v. *Citizens Trust & Guaranty Co.*, 153 Ky. 566, 156 S.W. 160, dealing with a State bank).

2. *Public policy.* It is understandable that the exercise of a power such as that of a bank to give security for deposits might come to be inhibited by reasons of public policy. For example, the power thus to secure private deposits might be said to be inhibited if it should be agreed that overruling considerations of public policy forbid its exercise. The extreme example is that of the power of the British King to veto acts of Parliament, which is really inhibited by universal acquiescence in a contrary public policy.

But, here, as to public deposits, there is the strong countervailing public policy requiring, for the benefit of the public at large, security for public deposits. The various acts of the Congress and of the legislatures of many states requiring that security be given for many different classes of public deposits, are all indicative of that well established public policy.

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mission, October 12, 1907, Sec. 38 (Sec. 506, Compilation of Acts of the Philippine Commission, 1908) reenacted in Section 625, Revised Administrative Code of the Philippine Islands of 1917, quoted on page 4 of the original brief herein for *amici curiae* on behalf of the People of the Philippine Islands; *Arizona Territory*, Act of March 16, 1905, afterwards carried into the State statutes after the admission of Arizona to the Union, as Section 4643, Revised Statutes of 1913, and now into Section 2623 and 2634 of the Revised Code of 1928, *infra*, Appendix, pp. 7-8.
None of these territorial statutes has ever been annulled by the Congress.

[4] *Confer* footnote "1", pages 57, 58 and 59 of the "Brief of Petitioners" herein, collating citations to such statutes in thirty-seven States of the Union, excerpts from some of which statutes by way of examples are quoted in the Appendix hereto, *infra*, pp. 7-14.

[5] *Smith* v. *Baltimore & Ohio R. Co.*, 48 F. (2d) 861, 867; *Pottorf* v. *El Paso-Hudspeth Counties Road District of Texas*, 62 F. (2d) 498 (CCA—V), both quoted on page 18 of the "Brief of Petitioners" herein.

3. *The amendment of* 1930 (c. 604, 46 Stat. 809) to Section 5153, Revised Statutes, which was Section 45 of the National Bank Act of 1864, *is not a repeal* of any part of Section 8 of the Bank Act (Section 5136, Rev. Stat.), nor a limitation on the powers which Section 8 grants to the banks.

The amendment does not carry any words of repeal; its purpose, as shown by the committee reports, was simply to clarify existing law. It is not to be presumed that the Congress intended by indirection, and without express words of repeal, to destroy the long established widely utilized powers of national banks to secure such important public deposits as those of the Territories and of their various political subdivisions; of government corporations such as the Inland Waterways Corporation, the Emergency Fleet Corporation, the Panama Railroad, the United States Spruce Production Corporation, and many others; of deposits of the funds of receivers, of clerks of courts, of Army post exchanges, of funds held for enlisted men of the military services such as "company funds" of the Army; and particularly of the large funds held for many years by many banks throughout the country under deposits by the Treasurer of the Philippine Islands, as security for the stability of the currency of those islands. Had the Congress meant to strike down the security for all those funds it would have put such an intention into no uncertain language. It would not have left it to be gathered by implication from an amendment containing no words of repeal.

4. There are appended excerpts from the statutes of several of the thirty-seven States which are collected in footnote 1, pages 57 to 59 of the "Brief of Petitioners" herein, illustrative of two things: (1) The very common provisions made by State legislatures directing State officials having public funds for deposit to designate *national banks* as well as state banks as public depositories of such public funds deposited under State laws, and to *"require"* such depositories, *national banks* as well as state banks, to give collateral security for such public deposits,—*showing the very general opinion of State legislators that national banks do*

possess power to give such security; since, of course, State legislators are not assuming to undertake to grant powers to national banks (*Appendix* I, *infra*, pp. 7-14); and (2) the *public policy* thus widely declared by State legislative authorities of requiring security for deposits of public funds. There are also appended (*Appendix* II, *infra*, pp. 15-23) pertinent extracts from the debate on the floor of the House of Representatives February 21, 1916, upon H. R. 3575, the bill to amend Section 5234 of the Revised Statutes (Section 50 of the National Bank Act of 1864) so as to authorize the Comptroller of the Currency to deposit funds of receivers of insolvent banks in such banks as the Comptroller may select, and to require collateral security for such deposits. The bill as reported by the committee provided for the Comptroller making such deposits only in *national banks*. It was amended on the floor of the House so as to permit such deposits to be made in *State banks* as well. *This is the converse of the picture.* Of course, *the Congress was not assuming to grant powers to State banks;* and the debate shows an apparently universal understanding on the part of all of the members of Congress taking part in it that banks generally,—State as well as national,—possessed the power to give security for such deposits. The amendment permitting such deposits in State banks,—and requiring such collateral security for the deposits—was urged by its proponents as a *privilege or advantage which was sought to be given to the State banks.*

WILLIAM CATTRON RIGBY,
Colonel, Judge Advocate,
Acting The Judge Advocate General,
FRED W. LLEWELLYN,
Major, Judge Advocate,
Amici Curiae on behalf of the People of the Philippine Islands.

SERAFIN P. HILADO,
Solicitor General of the Philippine Islands,
Of Counsel.

APPENDICES

APPENDIX I

Extracts, by way of examples, from some of the statutes of the 37 States cited in footnote 1, pages 57-59, of the "Brief of Petitioners" in this case.

These excerpts are from some of the States whose statutes expressly mention national banks, as well as State banks, as depositories of various public funds.

ALABAMA:

Sections 891, 892 and 893, Alabama Code of 1928:

> "The Governor may designate any bank or trust company incorporated under the laws of this State, or of the United States, * * * as a state depositary * * *." (Sec. 891.)
>
> "Before any bank or trust company shall be designated as a state depositary it shall file * * * an application in writing * * *, and shall accompany its application with a deposit of bonds * * * to be kept and held by the state treasurer * * * as a security * * * that it will well and truly account for and pay any moneys or funds of the state upon the check or order of the state treasurer." (Sec. 892.)
>
> "Upon the filing of such application * * *, and the deposit of bonds * * * the Governor may designate said applicant as a state depositary * * *." (Sec. 893.)

ARIZONA:

Secs. 2633, 2634, Revised Code of 1928:

> "The Governor * * * in the case of state moneys, the county treasurer * * * in the case of county moneys, and the town or city treasurer * * * in the case of town or city moneys may appoint and designate one or more banks within the state, doing business under the laws of the state or of the United States, to be a depository * * *." (Sec. 2633, reenacting Section 2, chap. 56, Laws of 1905, by which the territorial legislature of the territory of Arizona had made the same provision.)
>
> "Any bank, before receiving such deposit, shall execute and deliver a bond, * * * or said bank may deposit * * * in lieu of a surety bond, regularly issued and in-

terest bearing bonds of the following character: United States Government bonds * * *." (Sec. 2634, reenacting in substance Section 4643, Revised Statute of 1913, which itself was in substance a reenactment of paragraph 3776 of the Revised Statutes of 1901 of the territory of Arizona, as amended by Section 7 of Act No. 56 of March 16, 1905, Laws of the Territory of Arizona of 1905, p. 111, which provided:

"Any bank desiring to do so, may in lieu of the bond with security * * * deposit * * * interest bearing bonds of the United States, or of this territory or any county of this territory, at par, as security for public moneys * * *.")

CALIFORNIA:

(a) *State Funds.*—Act of April 12, 1923, c. 16, Statutes and Amendments of 1923, p. 21, Sections 1, 3 and 4:

"All moneys under the control of the state treasurer * ** shall so far as possible, be deposited by the state treasurer to the credit of the state in such state or national bank or banks in the state as the treasurer, with the approval of the Governor and State Comptroller, shall select * * *: *Provided*, that the bank or banks in which such money is deposited shall furnish security as hereinafter provided * * *." (Sec. 1.)

"There shall be two classes of depositaries; one shall be known as active depositaries and the other as inactive depositaries * * *." (Sec. 3.)

"For the security of inactive deposits, there shall be deposited with the treasurer treasury notes or bonds of the United States, or of this state * * *. For the security of active deposits, there shall be deposited with the treasurer treasury notes or bonds of the United States or of this state * * * or the surety bond or bonds of any corporation or corporations qualified to act as sole surety * * *." (Sec. 4.)

(b) *County and municipal funds.*—Act of April 12, 1923, c. 17, Statutes and Amendments of 1923, p. 25, Sections 1, 3 and 4. (*Substantially the same provisions as those relating to state funds quoted above from chapter 16, supra, enacted the same day.*)

(c) *Irrigation districts.*—Act of April 12, 1927, c. 100, Statutes and Amendments of 1927, p. 188:

"Any money belonging to any irrigation district * * * may be deposited * * *in any state or national bank or banks in this state * * *. Such treasurer or other officer shall require such bank or banks in which such money is deposited to furnish as security for such deposits, bonds of the United States or of the state * * *; or in lieu of such bonds * * * depositary bonds * * * by a surety for * * *."

GEORGIA:

State Depositories. Civil Code of 1910, Sections 1249, 1253 and 1256:

"The Governor shall name and appoint a solvent chartered bank * * * in each of the following cities and towns, * * * as state depositories; * * *." (Sec. 1249)

"* * *. In selecting any depository, the Governor * * * may, * * * select any bank chartered under the National Bank Act of the United States, * * *." (Sec. 1253)

"* * *. The bond to be made by the state depositories may be a personal bond or may be made by a deposit with the state treasurer of United States bonds or Georgia state bonds, or either one or both of said methods." (Sec. 1256)

IDAHO:

a. "Public Depository Law", Act of March 12, 1921; Laws of 1921, c. 256, pages 557, *et seq.*, carried without substantial change in the matters here cited into Title 55, Code of 1932:

"Any national bank or any state bank * * * may become a depository * * *." (Sec. 9, p. 559)

"Before designating any bank as a depository the supervising board shall require it to deposit securities or to give bonds * * *." (Sec. 11, p. 560)

"No security shall be accepted by the supervisory board except:

1. United States bonds * * *.

2. Bonds of the State of Idaho.
3. Bonds of any county * * *.
4. Bonds of the depositing unit.
5. Warrants of the State of Idaho.
6. Warrants of the depositing units.
7. Bonds of any association, corporation or company * * * listed in the New York Stock Exchange." (Sec. 12, p. 560)

b. State funds, Revised Code of 1909, Sections 127 and 129, carried into the Code of 1932 with amendments as Title 65, Sections 2623, 2625 and 2626.

> "The State Treasurer shall deposit * * * in the state or national banks, or some of them, doing business in this state * * *." (Sec. 127)
>
> "For the security of funds so deposited the State Treasurer shall require all such depositories to deposit securities * * *, or to give bonds * * *." (Sec. 129)

ILLINOIS:

a. State funds, "An Act in relation to State moneys", Laws of 1919, pp. 954 *et seq.*, Sections 3 and 10 (carried into c. 130, Cahill's 1931 Illinois Revised Statutes):

> "The State Treasurer shall, on the first Monday of February * * * cause a notice to be sent to each regularly established National and State Bank doing business in this State, indicating that * * * he will receive sealed proposals for the deposit of the public moneys in his custody or control. * * *." (Sec. 3, p. 955)
>
> "No moneys in the State Treasury shall be deposited in any bank approved as a depositary under the terms of this Act until such bank shall have deposited securities with the State Treasurer of equal market value to the amount of moneys deposited." (Sec. 10)

b. Funds of receivers of closed banks, Laws of 1929, pp. 174 *et seq.*, Section 11, par. 6 (p. 181), carried into paragraph 11, c. 16a, Cahill's 1931 Illinois Revised Statutes, provides that the receiver of a closed bank

> "shall deposit daily all moneys collected by him in any State or National Bank selected by the Auditor, who shall require of such depository satisfactory se-

curities or satisfactory surety bond for the safe keeping and prompt payment of the money so deposited." (Quoted on page 9 of the "Brief of Petitioners" herein.)

INDIANA:

a. Public funds generally. Act of March 9, 1907, Acts of 1907, pp. 391 *et seq.;* Burns' Annotated Indiana Statutes, Revision of 1914, Sections 7522, *et seq.*, particularly Sections 7531, 7532 and 7533 (being Sections 10, 11 and 12 of the Act of 1907), and Act of March 12, 1929, Acts of 1929, c. 132, p. 437, amending said last mentioned section:

"Immediately after the organizaton of said several boards of finance and the designation by them of public depositories * * * the several county treasurers, the several city treasurers, the several treasurers of the Board of School Commissioners * * * shall make deposit of such funds in the depository or depositories selected by said Board of Finance * * *." (Sec. 10, Act of 1907; Sec. 7531, Revision of 1914.)

"No public funds shall be deposited in any bank * * * unless such institution is subject by law to visitation and examination by the Comptroller of the Currency for the United States Government through national bank examiners, or by the auditor of state through said bank examiners * * *." (Sec. 11, Act of 1907; Sec. 7532, Revision of 1914.)

"The several banks and trust companies in lieu of a personal or surety bond * * * be designated as depositories upon their delivery to the State Board of Finance, or to the several boards of finance * * * the bonds of any county of this State, or issued by any county of this State for the improvement of roads, bonds of the United States, bonds of the State of Indiana, or, bonds issued under and by authority of the Federal Farm Loan Act, or the Federal Intermediary Credit Act, for the full face value * * * and held by the Auditor of State, or by the respective Boards of Finance * * * as security for such deposits * * *." (Sec. 12 of Act of 1907, paragraph 7533, Revision of 1914, as amended by Act of March 12, 1929, *supra.*)

(b) *Deposits of Sinking Fund Commissioners,* Burns' Annotated Statutes, 1926, sections 10314, 10315, 10319, 10321, 10324:

"For the purpose of creating a sinking fund for the gradual extinguishment of the bond indebtedness of any city, the common council thereof * * * may determine to create such fund; * * *". (Sec. 10314).

"The sinking fund * * * shall be under the control of three commissioners, * * *." (Sec. 10350).

"During the month of June of each year, * * * such commissioners shall notify each incorporated bank and trust company in such city of the amount of money then in the sinking fund * * *, and that * * * bids will be received and opened for the selection of a depository * * *." (Sec. 10319).

"The successful bidder shall * * * furnish a bond or security, or bond and securities, * * * conditioned upon the faithful accounting * * * of all moneys which may come into the possession of the depository. * * * The depository may, in lieu of a personal or surety company bond * * * deliver to said sinking fund commissioners the bonds of any county of this state, * * * bonds of the United States, bonds of the State of Indiana, bonds of the city of Indianapolis, or bonds of the school city of Indianapolis, * * * which bonds shall be deposited * * * as surety for such deposits; * * *." (Sec. 10321).

"No depository shall be selected other than an incorporated trust company or a bank incorporated under the laws of the United States or of the State of Indiana." (Sec. 10324).

LOUISIANA:

Public Deposits Generally; Act of July 11, 1912, Act No. 205, Acts of 1912, pp. 415 *et seq.,* Sec. 1, 2 and 5, carried into Louisiana General Statutes of 1932, Secs. 6632, 6633, and 6639:

"That * * * all funds of the State of Louisiana and of all parishes and municipalities thereof and of all public boards, commissions and bodies * * * shall be deposited daily, whenever practicable, * * *." (Act of 1912, Sec. 1).

"That the fiscal agent or agencies with whom such funds shall be deposited shall be such bank or banks organized under the laws of the State of Louisiana or of the United States and domiciled in this State as may be selected * * *; such bank or banks so selected to give security for the safe keeping and payment of such deposits and to pay interest * * *." (Act of 1912, Sec. 2).

"That the Board of Liquidation of the State of Louisiana and all parishes and municipalities thereof and all public boards, commissions and bodies * * * shall require as security for deposits made by them, the bonds of the United States of America, or of any colonial possession thereof, or unmatured bonds of the State of Louisiana or of any legally organized subdivision or board thereof, * * *. The bonds so furnished as security shall be deposited * * *

"The fiscal agencies and depository banks may, at their option in lieu of depositing bonds, furnish the indemnity bonds of a duly authorized surety company * * *" (Act of 1912, Sec. 5).

MISSISSIPPI:

Hemingway's Annotated Code of 1917, Sections 4191 and 4192 (State Funds); 4234 and 4240 (County Funds); 4250 and 4251 (Drainage District Funds and City and Village Funds).—Carried into 1930 Code as Sections 4324, 4326, 4340, 4346, 4357, and 4358.

"The State Treasurer shall deposit * * * in the state or national bank, or some of them doing business in this state the amount of money in his hands * * *." (1917 Code, *supra*, Sec. 4191)

"Any bank in this state may qualify as a state depository by placing on deposit as security with the state treasurer any of the following securities * * *; Mississippi Registered state bonds; Yazoo and Mississippi Delta Levy District Bonds; Mississippi Levy District Bonds; County bonds, and municipal bonds * * *; United States bonds; or surety bonds of any surety company authorized to do business in the state of Mississippi; * * *." (ib., sec. 4192).

"The amount of money belonging to the * * * county treasurer of each county in the state, shall be kept on

deposit in the state or national banks, or in some of them doing business in the several counties, * * *." (ib., sec. 4234).

"Any bank in a county, * * * may qualify as a county depository by placing on deposit with the county treasurer as security any of the following securities * * *: Mississippi Registered state bonds, * * *, United States bonds, Mississippi Drainage District Bonds, or surety bonds of any surety company authorized to do business in the state of Mississippi, * * *." (ib., sec. 4240)

"All funds * * * belonging to any drainage district shall be deposited in the depositories provided by this act, under the same conditions as county funds * * *." (ib., sec. 4250).

"The board of Mayor and alderman or other municipal authorities of each and every city, town or village in the state is hereby required to select a depositor in the manner provided by law for the selection of county depositors." (ib., sec. 4251)

APPENDIX II

Debate in the House of Representatives, February 21, 1916, on H. R. 3575, A Bill to Amend Section 5234, Revised Statutes (Sec. 50 of the National Bank Act of 1864). Cong. Rec., Vol. 53, Part 3, pp. 2899-2902.

The bill was read, as follows:

Be it enacted, etc., That section 5234 of the Revised Statutes of the United States be amended by adding at the end thereof the following:

"*Provided*, That the Comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities for the safe-keeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than 2 per cent per annum upon the average monthly amount of such deposits."

THE SPEAKER. Is there objection to the consideration of the bill?

MR. MANN. Reserving the right to object, I would like to have the gentleman in charge of the bill make an explanation of it.

THE SPEAKER. The gentleman from Massachusetts, Mr. Rogers, is the author of the bill.

MR. ROGERS. Mr. Speaker, this bill is to remedy an apparent injustice and an unbusinesslike practice which have prevailed for a good many years. A national bank fails in some city of the United States and a receiver is appointed by the Comptroller of the Currency, who proceeds to collect the assets. As fast as he collects the assets he turns them over to the Treasurer of the United States to the order of the comptroller, and they are retained by the Treasurer of the United States until the receiver has sufficient funds with which to pay a dividend. That may be weeks or months, or, in the case of protracted litigation, even years. The money lies in the Treasury of the United States without drawing a cent of interest, and the depositors are thus penalized in addition to the penalty which frequently follows as the result of the bank ultimately

proving insolvent. Further, the money which formed the assets of the national bank in question is taken out of the community just at a time when the community needs its funds most. Stringency in the financial resources of the city or town and consequent additional failures often result.

* * *

MR. MANN. Now, the gentleman gives as a reason if a national bank in a small city fails that to take the money out of the city would be a great detriment to the community. But there are a great many cities which have only one national bank, but which have other banks, namely, State banks. Why does the proposition come to deposit this money in a national bank which in the ordinary case where it would make any difference means that the money will be taken out of that city and deposited in a national bank in another city? In a large city this would not amount to anything one way or another, so far as the money is concerned.

MR. ROGERS. I followed that course because of the suggestion of the Comptroller of the Currency. Of course, I desired to draft a measure which would meet the approval of the comptroller and the Secretary of the Treasury. I do not know whether they would approve, for their part, such a suggestion as the gentleman has in mind. I suppose their theory may be that there is an additional measure of security in the case of deposits in a national bank over and above that which results in the case of money deposited in a State bank.

MR. MANN. The statement is "United States bonds or other satisfactory security."

MR. ROGERS. Is it not possible that their theory is that they have a direct personal control over national banks which is necessarily lacking over State banks?

MR. MANN. Oh, well, I know why they do not approve the deposit of money in banks other than national banks. It is because they are seeking to use force in every way they can to compel the banks—State banks and trust com-

panies—to come into the Federal Reserve System. Every place they can they knock. "Knock," the most offensive term, is the proper term to apply. They knock every effort made to do anything or deposit money in a State bank or trust company.

MR. PLATT. Mr. Speaker, will the gentleman yield?

MR. MANN. I have not the floor.

MR. ROGERS. I will yield to the gentleman.

MR. PLATT. The gentleman says a great many cities have only one national bank, but this would not make any difference in a large city. There are many cities of 10,000 inhabitants and more that have two or three national banks, and some have even four or five.

MR. MANN. It would help those. But that is no reason for not helping a city that has only one national bank. * * *

MR. SMITH of Minnesota. Mr. Speaker, I feel it would not be wise for the national banking system to authorize deposits of funds in the State banks over which the Federal Government has no control or inspection. I believe that is the reason for the limitation in the bill under consideration.

MR. MANN. The gentleman knows that we have in recent years authorized the deposits of national funds in State banks.

MR. SMITH of Minnesota. Under proper security.

MR. MANN. Yes; and proper security is provided here.

MR. SMITH of Minnesota. Even though that may be so, I do not believe it is good policy.

MR. MANN. Well, that is a question. When we passed the bill there was no one here who raised any dissent. * * *

MR. ROGERS. It is important to add, as to the practical effect of the bill, that today, in case of a receivership of a national bank, there is no provision for interest as to any of the funds which are collected. This being so, the depositor does not care what the disposition or location of the fund is; he is kept out of his interest just the same, wherever it goes.

MR. NORTON. I think that is a correct statement. I do not think there is any difference in handling the cash or the other funds received from the sale of property of a defunct national bank. If the funds of a national bank that has failed are deposited in any other bank, the receiver now would be held liable under his bond for such funds. That is the practical part of it. Would the gentleman from Massachusetts have any objection to an amendment providing that the funds might be deposited in a State bank as well as a National bank?

MR. ROGERS. Only this. This bill has met with the approval of the Secretary of the Treasury and the Comptroller of the Currency; and, while I should not personally object to it, I am not quite sure that there is not some objection that I do not know about, not being an expert in such matters. I certainly shall not oppose any amendment of that kind.

MR. SLOAN. Will the gentleman yield?

MR. ROGERS. Yes.

MR. SLOAN. The gentleman seems to concede the suggestion of the gentleman from Minnesota (Mr. Smith) that we would discriminate in such matters in favor of national banks against the State banks. Does the gentleman think that should be done in a large community, considering the number of State banks providing additional means of security over the national banking system?

MR. ROGERS. I did not mean to concede the suggestion. I said the bill in this form had been approved by the Secretary of the Treasury and the Comptroller of the Currency, and that I therefore hesitated to adopt any material change without knowledge of their attitude toward it.

MR. SLOAN. But we do the legislating, do we not?

MR. ROGERS. Precisely.

MR. SLOAN. And we are not obliged to follow the executive department.

MR. ROGERS. If the gentleman will permit me, I think, upon reflection, that the suggested change ought to be

wholesome because, as the gentleman from Illinois said, there is abundant provision for security which must be exchanged for any such deposit in any bank.

Mr. Sloan. In many counties in my State there are no national banks, and they are becoming less for a number of reasons, one of which is that the State banks provide for additional security for depositors beyond that provided by the national banking system, and if that is the case it does not seem fair to the State banking institutions that the Government should discriminate in the deposits of its funds. Further, I would suggest that this bill apparently is in the interest of the depositors, and being vouched for by the Secretary of the Treasury as he emphasizes it, does not the gentleman think that in the interest of depositors under the national banking system it would be salutary legislation to have a system either compulsory or voluntary guaranteeing bank deposits as they do in some States? In some States it is compulsory, and in others they authorize an organization or association for guaranteeing bank deposits, both of which would materially strengthen the depositors, so that if there is a failure it would be bankers and others that would be interested, but the depositors would draw the funds and draw them promptly.

Mr. Rogers. I would refer that question respectfully to the Committee on Banking and Currency and keep it comfortably clear of this particular measure.

Mr. Wingo. Will the gentleman yield?

Mr. Rogers. Yes.

Mr. Wingo. The gentleman from Nebraska (Mr. Sloan) suggests that there is a discrimination. There is no discrimination in this proposed bill. I am opposed in any discrimination against the State banks, as is the gentleman from Nebraska, but I think the present law is such if you strike out the word "national" in line 8 of the bill, the present law would require these deposits to be made in the national banks on account of the provisions that were made in the act revising the banking and currency law.

Of course it is contended by those who procured the passage of the banking and currency act that the United States Government should not undertake to deposit any funds under its control in any institution except one chartered by it. So I should think if you cut out the word "national" you would still be confronted by the provision on the statute books which would require the comptroller to deposit the funds in a national bank.

It is not intended by this bill to make any discrimination; it is following the general law. The truth of the thing is, and the whole milk in the cocoanut is, although it goes about it in a roundabout way, the whole object is to require interest to be paid on the deposit of the funds held by the receiver of a national bank. That is the real purpose of the act and the only effect it will have.

Mr. Smith of Minnesota. Mr. Speaker, reserving the right to object, I am afraid my distinguished friend from Nebraska (Mr. Sloan) has misinterpreted my statement. I would be the last one to stand for discrimination against a State bank. What I meant to convey was the fact that this is a fund belonging to a national bank, belonging to the national banking system, and that there is no reason for turning it over to a State bank that is entirely under another jurisdiction and belonging to another system. If this was a Government fund I should say the State banks should be treated the same as a national bank; but it is a fund that belongs to the national banking system, and it should not be turned over to another system where there is no inspection by the National Government and it is not under the control of the Federal Government.

Mr. Sloan. While it may have started in a system belonging to the national banks, it is a fund belonging to the local depositors, and has no relation to the funds of a national bank. If I understand the scope of the bill, it is simply taking care of the money belonging to the depositors, and it ought to be in the community where it belongs.

Mr. Smith of Minnesota. But that depositor saw fit to

patronize the national banking system, and the Government should not step in and turn it over to the State banking system. It should be continued in the system in which it started.

THE SPEAKER. Is there objection? (After a pause). The Chair hears none. This bill is on the Union Calendar. * * *

MR. NORTON. Mr. Speaker, I have an amendment which I desire to offer, which I send to the desk and ask to have read.

THE SPEAKER. The gentleman from North Dakota offers an amendment, which the Clerk will report.

The Clerk read as follows:

Page 1, line 8, after the word "any", insert the words "state or".

MR. NORTON. Mr. Speaker, the amendment which I offer will in its effect permit the comptroller to place these funds in any State bank or in any National bank. I can not think of any good reason why the comptroller should not place these funds in a State bank in a town in which a National bank may have failed, providing sufficient security for the deposits be given to the Federal Government by the State bank. I do not believe we should longer proceed in this legislative body to enact legislation that will discriminate against the State banks of the country. One of the most able and distinguished bankers in the State of Minnesota, a man who has charge of one of the largest banking institutions in that State, told me a few months ago that the Secretary of the Treasury, while on a trip to the Pan Pacific International Exposition, and while incidentally making political speeches through the Western States, in going through the State of Montana spoke on the banking situation of the country in one of the largest cities of Montana. He was the guest while in this city of one of the officers and directors of one of the largest and strongest banks in Montana. The banker gathered together the business men of the city at a large banquet to do honor to the Secretary of the Treasury, as the son-in-law of President Wilson, and as his chief representative in the Cabinet. In

the course of the evening at this banquet Secretary McAdoo stated, as my informant told me, that he believed every State bank of the country should join the Federal reserve system, and further made the startling statement that he did not consider it safe for depositors to place their money in State banks. You can probably imagine how such a statement was received by the gathering that evening.

The Minnesota banker to whom I talked told me that those attending the banquet were surprised as they never had been in their life before. They had never imagined, he said, that a man, occupying the high position occupied by Mr. McAdoo would make any such an outrageous statement concerning the State banking institutions of the country. My study of this question leads me to believe that in any further banking legislation we may enact we should not enact provisions of law such as are proposed by this bill. There is no good reason why we should deliberately discriminate against State banks.

MR. SLOAN. Mr. Speaker, will the gentleman yield?

MR. NORTON. Yes.

MR. SLOAN. Is it not a fact that of all the 12 regional banks of the country only a few have paid expenses during the last year, and that only one of them has paid a dividend, and that into such organizations as that the Secretary of the Treasury is trying to drive the State banks of the country to put their money by the millions, into cold storage?

MR. NORTON. Mr. Speaker, I will say to the gentleman in reply that I do not know as to whether the Federal reserve banks have been largely profitable in dividends or not. Whether they have or not, I am firmly convinced that the Federal reserve banking system is a good one and that is rendering a splendid and valuable service to the commercial banking business of the country, and will continue to render such service. But because The Federal Reserve System has proven successful or otherwise is not any reason why we should enact legislation discriminating against the State banks of the country.

MR. WINGO. Mr. Speaker, I hope the amendment pending will be adopted, for practical reasons. The gentleman from Illinois (Mr. Mann) has already suggested an illustration that will show the practical necessity for the amendment that is now pending, and that is this: Suppose in a small community where there are only two banks, one a State bank and the other a national bank, which is frequently the case in towns of from one to two or three thousand people, and suppose the national bank should fail. If the amendment offered be adopted, then if in the opinion of the Comptroller the State bank that is left as the only bank in that community can give proper security, the funds that really belong to the community could be kept in it and deposited in the State bank. Of course, if it were not a safe institution, if it could not give the proper security, the Comptroller would not be required to deposit the money there, but he should be permitted to keep those funds in the local community as far as possible. For that reason I hope the amendment will be adopted.

(Congressional Record, Volume 53, Part 3, pp. 2899-2902, 64th Cong. 1st Session.)

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, *a Municipal Corporation, et al.*, *Petitioners*

vs.

BEN SNEEDEN, *as Receiver of the* CITY NATIONAL BANK OF HERRIN, ILLINOIS, *Respondent.*

SUGGESTIONS BY AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS, IN SUPPORT OF THE PETITION FOR REHEARING.

WILLIAM CATTRON RIGBY,
Colonel, Judge Advocate,
FRED W. LLEWELLYN,
Major, Judge Advocate,
Attorneys for The People of the Philippine Islands.

SERAFIN P. HILADO,
Solicitor General of the Philippine Islands,

ARTHUR W. BROWN,
The Judge Advocate General,
Of Counsel.

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SUGGESTIONS BY AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS IN SUPPORT OF THE PETITION FOR REHEARING HERETOFORE FILED BY THE PETITIONERS HEREIN.

It is submitted that a reargument of this case should be ordered as requested by the petitioners in their petition for rehearing; and particularly for the following reasons:

1. This court in its opinion in this case said:

> "*First.* For the reasons stated in *The Texas & Pacific Railway Co.* v. *Pottorff*, No. 128, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States."

It is submitted that in so deciding this primary question in this case upon the authority of *Texas & Pacific Railway Co.* vs. *Pottorff* this court overlooked the essential distinction between public deposits on the one hand, and private deposits on the other hand, in relation to the power of

banks to pledge assets to secure such two classes of deposits, respectively. The opinion in the *Pottorff case,* No. 128, *supra,* deals only with private deposits, and apparently not at all with public deposits; and the opinion in the instant case appears to overlook the wide distinction between these two different classes of deposits, which was pointed out in the briefs in the present case.[1]

2. This court further says in its opinion in the present case:

> "In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power to do so. But the assumption was erroneous."

And further that:

> "The contention that such power is generally necessary in the business of deposit banking has not been sustained."

It is submitted that the court has here overlooked essential points in the argument presented by the petitioners and by *amici curiae* in support of the power of national banks to secure public—(*as contradistinguished from private*)—deposits.

Petitioners' argument in this case is not understood to have rested primarily upon any contention of fact or opinion that such power so to secure public deposits was, when looked at from the bank's standpoint, "generally necessary in the business of deposit banking".

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[1] Petitioners' brief in support of the petition for the writ of certiorari, pp. 10-11; Petitioners' brief on the hearing of the case (petitioners' second brief), pp. 12-18, 42-59; "Supplemental Suggestions by Amici Curiae" filed at the time of the oral argument, pp. 4-6.

It did not rest upon any such question of fact.[2] On the contrary petitioners' argument here rested on ordinary grounds of statutory construction: That prior to the adoption by Congress of the National Bank Act of 1864 this court had indicated that banks did have power generally to pledge assets to secure *public* deposits;[3] that the Congress, therefore, in enacting Section 8 of the National Bank Act in 1864, granting to national banks the general powers "necessary to carry on the business of banking * * * by receiving deposits", must be deemed to have used that language in the light of those previous decisions of this court, and to have intended to grant the incidental powers then understood to appertain to the business of banking as generally carried on, including this power; that the statute has ever since been universally so interpreted by the federal executive authorities charged with its administration, particularly by successive comptrollers of the currency, for a period of now almost seventy years, and likewise by territorial legislative and executive authorities and by State legislatures; that the legislatures

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[2] Such a contention seems to have been made by counsel for the petitioner in the *private deposits* case,—the *Pottorff case*, No. 128, *supra*. And this court notes in its opinion in that case that: "The record is barren of evidence that the practice of so pledging assets has ever prevailed among national banks"; that is to say, of so pledging assets to secure *private* deposits. But as to so securing *public* deposits the practice is precisely the contrary; as to such *public* deposits it is believed to have been a well nigh universal practice among banks all over the country. *Confer* the letter from the deputy comptroller of the currency; Appendix II, *infra*, p. 16.

[3] *United States* v. *Robertson*, 5 Pet. (30 U. S.) 641 (MARSHALL, C. J.; 1831). *Planters Bank* v. *Sharp*, 6 How. (47 U. S.) 301 (WOODBURY, J.; 1848). And *confer* also the decision of the Court of Appeals of New York which covered private as well as public deposits: *Smith* v. *Lansing*, 22 N. Y. 520 (1860). All cited by petitioners and by *amici curiae* in former briefs herein.

of some thirty-seven States have apparently so construed it, as have likewise the territorial legislatures of the Philippine Islands and of Arizona (when Arizona was a Territory, acting under federal law), as well as various State and territorial executive authorities charged with the execution of the statutes of those jurisdictions;[4] that in reliance on such interpretation it has been the almost universal practice of national banks throughout the country thus to secure public deposits of various kinds by pledges of assets, and that very large amounts of such deposits have been and are being carried by many banks throughout the country;[5] that successive comptrollers of the currency have formally ruled in formal official opinions,—(particularly in the letter of former Comptroller of the Currency Pole, July 19, 1930, hereto appended),[6]—that national banks do have such power as to public deposits (*although not as to private deposits*); and that in reliance upon such rulings settlements have been made in the liquidation of many banks throughout the country in which

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[4] *Confer* petitioners' brief on the hearing (petitioners' second brief herein), pp. 57-59; "Supplemental Suggestions by Amici Curiae on Behalf of the Philippine Islands", filed herein at the time of the oral argument, pp. 3-4, and 5-14; and see also letter of former Comptroller of the Currency Pole, hereto appended (Appendix I, *infra*, pp. 5-14).

[5] E.g., approximately $63,000,000 for the Philippine Government distributed among 34 national banks and 13 state banks, members of the Federal Reserve System (original brief of *amici curiae* on behalf of the Philippine Islands herein, p. 5); approximately $125,000,000 by the City of Chicago in various banks (brief of *amicus curiae* on behalf of the City of Chicago, in this case, p. 2); and public deposits of various kinds thus secured, in upwards of 65 per cent of all of the national banks of the country at the present time, both those now open and those now closed and in the hands of conservators or receivers or liquidators (letter of the present deputy comptroller of the currency hereto appended; Appendix II, *infra*, p. 16).

[6] Appendix I, *infra*, pp. 8-15.

very large amounts of money,—running in the aggregate into many millions of dollars,—have been paid over to municipalities and other public agencies of different kinds, as the proceeds of sales of assets so pledged as collateral to secure such public deposits;[7] that such long continued uniform and uninterrupted interpretation of the statute for nearly seventy years by the federal executive authorities charged with its administration,—and by State and territorial authorities, executive and legislative, in relation to it,—is entitled to great weight in its construction; and that **the rule thus established has become a rule of property**, and should not be disturbed except for the gravest reasons. If changing public policy now requires a change in the rule, that is for the legislative authority.

So far as public policy is concerned this argument does not view the question from the standpoint of the banks; but rather, on the contrary, from the standpoint of the public welfare. As was said by Comptroller of the Currency Pole in his letter of July 19, 1930, to the Receiver of the Texas National Bank (Appendix I, *infra*, p. 11):

> "It is now generally conceded that the designation of a bank as a public depositary inspires confidence in the bank and increases its public usefulness, and it has become generally recognized that *it is a matter of public policy that public deposits, whether federal or state, should be secured and protected*, either by the pledging of assets or by other adequate method. It is of prime importance that public deposits, consti-

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[7] Letter from the present deputy comptroller of the currency; Appendix II, *infra*, p. 16.

Under these circumstances, absence of litigation during all the years is the strongest evidence of universal acquiescence. None of the thousands of depositors and general creditors adversely affected appears ever to have thought it worth while to contest decisions of receivers of all these hundreds of closed national banks permitting such payments under directions of successive comptrollers of the currency.

tuting as they do the funds essential to maintain the government, state and federal, be adequately protected so as to insure the continued functioning of the governmental machinery." (*Italics represent words underscored by the Comptroller of the Currency.*)

3. There is appended a copy of that letter from former Comptroller of the Currency Pole to the Receiver of the Texas National Bank, of Fort Worth, dated July 19, 1930, only four weeks after the 1930 amendment to Section 45 of the Act of 1864 (Section 5153 of the Revised Statutes), directing the Receiver's action in relation to such a secured deposit of the city, made prior to that amendment,[8] from which it appears that the contemporary opinion of the comptroller of the currency was that the 1930 amendment was *not* a new grant of powers to national banks, in so far as the power to secure *public* deposits is involved; but that, as to public deposits, the power thus to secure them had always existed under Section 8 of the National Bank Act of 1864. It is submitted that this contemporary official opinion of the comptroller of the currency, officially charged with the execution of the statute, when taken in connection with the clear indications in the formal reports of the committees reporting the bill[9] that it was the purpose simply to clarify and remove doubt as to existing power, and also in connection with the belief apparently held by all of the members of Congress taking part in the debate on the earlier amendment of Section 50 of the National Bank Act on February 21, 1916,[10] very far outweighs the oral statement by Senator Thomas in the course of the debate in introducing the bill, quoted by this court in Footnote 13

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[8] Amendatory act of June 25, 1930, c. 604, 46 Stat. 809.

[9] Quoted in petitioners' brief on the hearing herein (petitioners' second brief), p. 23, foot-note "1".

[10] Quoted on pages 15 to 23 of the Appendix to the "Supplemental Suggestions by Amici Curiae on Behalf of the Philippine Islands" filed herein at the time of the oral argument.

of its opinion in the *Texas & Pacific Railway Co.* v. *Pottorff case*, No. 128, *supra*. Or, rather, it is submitted that Senator Thomas in his oral statement did not really mean to change the effect of the formal report of his committee as to the purpose of the bill being merely to clarify existing powers and not to grant new powers,—dealing wholly, of course, with giving security for public deposits, as contra-distinguished from private deposits.

4. It is understood that somewhat analogous questions are presented in the petition for certiorari now pending before this court in Case No. 802 at the present term, *John C. Lewis, Receiver of the Hancock National Bank of Sparta, Georgia,* vs. *Fidelity and Deposit Company of Maryland.*

CONCLUSION

It is submitted that in view of the great public interests involved, the petition for rehearing should be granted and a reargument allowed.

WILLIAM CATTRON RIGBY,
Colonel, Judge Advocate,

FRED W. LLEWELLYN,
Major, Judge Advocate,
Attorneys for The People of the Philippine Islands.

SERAFIN P. HILADO,
Solicitor General of the Philippine Islands,

ARTHUR W. BROWN,
The Judge Advocate General,
Of Counsel.

APPENDICES

Appendix I—Letter of former Comptroller of the Currency Pole, July 19, 1930.

Appendix II—Letter of the present Deputy Comptroller of the Currency.

APPENDIX I

LETTER OF FORMER COMPTROLLER OF THE CURRENCY, J. W. POLE

July 19, 1930

Mr. R. L. Van Zandt, Receiver,
Texas National Bank,
Fort Worth, Texas.

Dear Sir:

Reference is made to your letter of July 7, 1930, and to previous correspondence, concerning the course to be pursued by you as Receiver with reference to taking action against the City of Fort Worth to recover the value of certain collaterals of a face value of $208,678.36 which had been pledged by the Texas National Bank with the City to secure its deposit, said collaterals having been foreclosed and sold by the City subsequent to suspension and applied on account of the deposit balance of $218,540.77, leaving a deficiency of $23,192.17, for which amount the City now desires to file a general claim against your trust.

The Depositors Committee of the bank is of the opinion that the pledge of these collaterals was *ultra vires* and invalid and has made formal demand upon you that appropriate action be taken to recover the value of the collaterals from the City, and your general counsel has submitted a memorandum from which it appears he is inclined to take the same view. We have submitted the matter to our legal department and after full consideration of the various factors involved, we have reached the conclusion, for the reasons hereinafter stated, that it was not *ultra vires* on the part of the Texas National Bank to pledge these collaterals and that under the existing circumstances no action should be taken by you to attempt to set the pledge aside.

The collaterals were pledged in accordance with the provisions of a contract of August 31, 1925, between the City of Fort Worth and the Texas National Bank, wherein the

bank agreed at all times to pledge collaterals corresponding in amount to the amount of the deposit balance. It thus appears that the contract of pledge was executed approximately four and a half years prior to suspension of the bank, and it is understood that no question is raised as to the good faith of the parties in making the contract, or in pledging the collateral in pursuance thereof, and there seems to be no basis for believing, and in fact it is not understood that it is contended, that the pledge of the collateral was contrary to Section 5242 U.S.R.S. prohibiting pledging of collaterals or transfer of assets in contemplation of insolvency with a view to preferring one creditor over another. Hence, it is necessary to consider only the question of whether or not it was *ultra vires* on the part of the bank to pledge the collateral under the existing circumstances.

It appears that the state statutes require that city deposits be secured by bond, but no provision is made for the pledging of collaterals to secure deposits, and consequently it cannot be said, in the instant case, that the city deposit was secured in the manner designated by the state statutory requirements. A similar situation was passed upon by the Commission of Appeals of the State of Texas in the cases of *Foster et al* v. *City of Long View et al,*[11] and *Austin Banking Commissioner* v. *Lamar County,*[12] both decided on April 23, 1930, wherein the court held that certain pledges of collateral by *state* banks were invalid because not specifically authorized by state statute. The position of your counsel, and of the Depositors' Committee, is that these decisions are controlling, in that the state statute contains no provision authorizing the pledging by a depository bank of collaterals, as distinguished from the giving of a bond to secure deposits.

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[11] 26 S. W. (2d) 1059.
[12] 26 S. W. (2d) 1062.

The reasoning upon which the court based its decisions in the two cases above mentioned was that:

A. It is contrary to the public policy of the state for a bank to pledge its assets as security for deposits, in that such course:

   (1) Destroys the confidence of the public in the bank,
   (2) Impairs its public usefulness, and
   (3) Allows a selected few of the depositors to obtain an advantage over the general depositors, and

B. A bank can only pledge its assets or give security for deposits where specific statutory authority permits a departure from such public policy, and in such case the pledging must be in accordance with the requirements of the statute.

This reasoning is also substantially the basis of the cases cited by the court in support of its decisions.

We are unable to conclude that the state decisions above mentioned correctly set forth the applicable principles so far as national banks are concerned.

In the first place, it must be recognized that no state can, either by statute or by state decisions, establish or enforce the public policy of the state so as to restrict the functions of national banks permitted by federal law (*First National Bank* vs. *Missouri,* 263 U. S. 640; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *Easton* v. *Iowa,* 188 U. S. 220; *Farmers and Mechanics National Bank* v. *Dearing,* 91 U. S. 29), nor can the states, by way of complement to the legislation of Congress prescribe additional regulations or auxiliary provisions affecting the operations of national banks (*Prigg* v. *Pennsylvania,* 16 Peters 539, 617-619; *Easton* v. *Iowa, supra,* 257). Consequently it would seem

clear that while it may be assumed that the *City of Long View* and the *Lamar County* cases, above referred to, are conclusive, so far as the power of *state* banks to pledge assets to secure deposits is concerned, such decisions cannot detract from, or restrict the powers of, national banks either expressly conferred or exercised as part of the incidental powers of a national bank.

Adverting next to the matter of public policy and the reasoning upon which the foregoing state cases were decided, it may be conceded that so far as private deposits are concerned the pledging of assets to secure the same does tend to destroy confidence in a bank, impair its usefulness, and give a selected few an advantage over the general creditors; but so far as public deposits are concerned, we feel that **it is now generally conceded that the designation of a bank as a public depositary inspires confidence in the bank and increases its public usefulness,** and it has become generally recognized *that it is a matter of public policy that public deposits, whether federal or state, should be secured and protected,* either by the pledging of assets or by other adequate methods. It is of prime importance that public deposits, constituting as they do the funds essential to maintain the government, state and federal, be adequately protected so as to insure the continued functioning of the governmental machinery. Consequently it is almost, if not completely, the universal practice in the states that public deposits be secured, either by pledging of assets or otherwise, so that it may be fairly said that the pledging of assets or the giving of bonds to secure public deposits (as distinguished from private deposits) has become an incidental function of banking, both state and federal. So far as national banks are concerned, Congress has specifically recognized, in principle, both the necessity for the protection of public deposits and *that the pledging of assets of a bank to secure public deposits is a proper operation in the functioning of banks.* Section 5153 U. S. R. S. provides for the designation by the Secretary of the

Treasury of national banks, as depositaries of the Federal public monies, and requires such national banks

> "to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government."

Section 5234 U. S. R. S. provides that the Comptroller of the Currency may deposit in national or state banks monies derived from the liquidation of insolvent national banks, and that such depositary banks shall

> "deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than two per centum per annum upon the average monthly amount of such deposits."

Section 5136 U. S. R. S. provides, *inter alia,* as to the powers of national banks, that they shall have authority

> "to exercise * * * all such *incidental powers* as shall be necessary to carry on the business of banking * * *".

It has long been the established policy of this office to recognize that national banks do have, as an "incidental" power, the authority to pledge assets to secure *public* deposits, state as well as federal, and national banks throughout the country have not hesitated, so far as the interpretation of the national banking law by this office is concerned, to pledge their assets to secure such deposits. The construction placed upon a statute by the office charged with its execution and administration is entitled to weight, by the courts, in interpreting the statute. See *Kern River Company* v. *U. S.,* 257 U. S. 147; *Corsicana National Bank*

v. *Johnson,* 251 U. S. 68; *First National Bank of St. Louis* v. *Missouri,* 263 U. S. 640; *United States* v. *Minnesota,* 270 U. S. 181.

This universal practice of giving security, either by way of pledging assets, or otherwise, for public deposits, was very recently again recognized, as a matter of public policy and of incidental banking powers, in the Act of June 25, 1930 (Public No. 431, 71st Congress),[13] amending Section 5153 of the United States Revised Statutes as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

This statute does not, in our opinion, confer any new powers upon national banks, but is intended merely to regulate the existing powers of national banks and to restrict, in the future, the giving of security by national banks to the practice followed by state banks and thereby render the practice uniform as to both national and state banks. The statute will doubtless be of substantial value in meeting future questions, but of course it cannot be retroactive in its operation so as to affect adversely, completed transactions.

We have no doubt that the pledge of assets was made by the Texas National Bank, in the instant case, in reliance upon the generally recognized policy of this office that it is proper for a national bank to pledge its assets to secure public deposits. The contract providing for the pledge of such assets was made approximately four and one-half years prior to suspension and apparently was observed in good faith by the parties thereto during all of that period. The Texas National Bank received the benefit of the con-

[13] Chap. 604, 46 Stat. 809, *supra.*

tract by obtaining the deposits thereunder, and the deposits were made by the City in consideration of the pledging of the assets.

The City of Fort Worth is not seeking to set aside this contract, and it does not seem fitting that the Bank, or its Receiver standing in its place, should do so. In this connection a distinction is to be noted between the power of a national bank to pledge its assets to secure a state public deposit (or of a political subdivision thereof) and the power of the state public officer to make the deposit and accept a pledge of collateral where the state statutes prescribe a different method of security for the deposit. If the national bank has the power to make the pledge, and the defect is merely in the power of the state officer to accept the pledge on behalf of the state, the basis of attack would be, not the lack of inherent power of the national bank to make the pledge, but the lack of power of the state officer to accept the pledge and make the deposit. Consequently, if in such case, in spite of the breach of state statutory requirement as to the *method* of securing the deposit, the state has nevertheless been made whole or sees fit not to question the transaction, there would seem to be no occasion for it to be questioned by the bank, inasmuch as the wrong would have been committed, not against the bank but against the state.

It is, therefore, our conclusion, in view of the foregoing, that it was not *ultra vires* on the part of the Texas National Bank to pledge these collaterals, and that the restrictions imposed by the state upon the powers of state banks cannot detract from the powers of the national bank, and that consequently, the state decisions above referred to have no application to the instant case; and that inasmuch as the parties to the contract have acted in good faith, and the contract has been performed, and is not being questioned by the City of Fort Worth, it is not proper that this office, through you as Receiver, attempt now to

set it aside. You are therefore instructed to approve the deficiency claim of the City of Fort Worth in the sum of $23,192.17, and issue a Receiver's Certificate covering the same. A copy of this letter is herewith enclosed for the consideration of your general counsel and for his information as to our reasons for the position herein taken, and a copy of the letter will also be sent by this office to the Depositors' Committee for its information.

Yours very truly,

J. W. POLE.
Comptroller of the Currency.

APPENDIX II

TREASURY DEPARTMENT
Washington eb

Comptroller of the Currency

March 6, 1934

The Judge Advocate General,
War Department,
Washington, D. C.

Sir:

In reply to your informal inquiry of March 6th concerning the percentage of National banks, open and closed, which have pledged assets to secure public deposits, other than deposits of the United States, you are advised that we estimate that such pledges have been made by more than 65 per cent of such banks, open and closed. Accurate information in this connection can be obtained from bank reports on file in this office, if desired, but several days clerical work is involved.

Secured claims of many such public depositors against closed National banks located throughout the United States have been allowed and reconciled by permitting the public depositors to retain the proceeds of the pledged collateral, valued at many millions of dollars.

Yours very truly,

F. G. AWALT
Deputy Comptroller

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION; AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,

Petitioners,

VS.

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of the City of Chicago, as Amicus Curiae.

WILLIAM H. SEXTON,
Corporation Counsel,
Attorney for the City of Chicago.

LEON HORNSTEIN,
First Assistant Corporation Counsel,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 368

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STATEMENT.

MAY IT PLEASE THE COURT:

The City of Chicago seeks by its petition to present a feature of the above entitled cause which does not readily appear from the proceedings involving the deposits of a smaller municipality—that is, the fact that in the case of larger municipalities it is impossible under present condi-

tions to obtain protection for public funds unless the depositaries for same have the right to pledge their assets for this purpose.

The City of Chicago is a municipal corporation located in the State of Illinois and within the seventh judicial circuit. It has a population of approximately three and one-half millions and has large financial and property interests, and collects and disburses large sums of money. The law of the State of Illinois requires that its funds should be kept in depositaries selected from national and state banks which submit bids for the payment of interest thereon. Its funds accumulate to such an extent that it is not unusual for it to have $125,000,000 at one time on deposit in the various depositaries named by it for the purposes of such deposits. The loss of any large amount of this money through the insolvency of any city depositary would be so serious a blow to the city that its effect might be calamitous.

Prior to the year 1930 the various national and state banks located in the city made offers in response to the annual advertisement for bids, and when selection of these was made for the purpose of naming depositaries, so many of these banks qualified for the purpose that sometimes as many as 225 banks were designated as official depositaries for city and school funds for said city.

When so many depositaries were named the funds were distributed so that it was easy for the various depositaries to obtain bonds of accredited surety companies covering the deposits.

The ordinances of the city authorized the deposit of money in such depositaries in case the depositaries furnished adequate surety bonds or furnished collateral of

certain kinds designated in the ordinance, namely, federal government securities and bonds of the State of Illinois or of the City of Chicago or of the board of education of the City of Chicago or tax anticipation warrants of said city or school board.

Since the beginning of the year 1930 there has been a constant falling off of the number of banks which were able to bid and qualify as depositaries for the city. The surety companies whose bonds were acceptable have also become more careful in assuming risks, and the number of such surety companies that were sound have been somewhat reduced.

As a result of these conditions and the general financial situation in the country the City of Chicago was able to name only four depositaries for its funds for the year 1933 and it is not likely to secure any more for the year 1934.

The said city at one time had as much as $65,000,000 on deposit in one of its depositaries at one time. It still has immense sums on deposit, and in the year 1933 had as much as $18,000,000 on deposit in one of its depositaries at one time. It is likely to have funds amounting to $25,000,000 or more in one depositary within the near future.

In accepting bonds of surety companies the officers of the city have followed the rule adopted by the United States Treasury department and have accepted bonds only to the extent of ten per cent of the capital stock of a surety company for any single risk. This has been considered the only safe rule to follow. Under present conditions, if this rule were followed, it would be impossible to secure bonds covering the maximum amount that the city would deposit in one depositary, since there are only about seventy-five accredited surety companies in the country and

the total of ten per cent of their capital stock accounts to only $18,869,000. Consequently, if all of the surety companies were to join in a bond for one of these depositaries (which is not practicable), such a bond would not be sufficient to protect the city against loss in case a large financial institution acting as its principal depositary should close its doors. Under the alternative provision of the ordinances of the city which authorizes the acceptance of collateral security from the depositary, the city was able to obtain adequate security to protect its large deposits, up to the time of the rendering of the decision in this cause by the Circuit Court of Appeals on April 25, 1933. Since then its deposits have been without protection of any kind. If the decision of the Circuit Court of Appeals should become the established law of the jurisdiction this means of securing its deposits would be cut off, and the deposits of the city of Chicago in its official depositaries would remain without security as they are at present.

That there is necessity for the securing of the deposits in one or the other manner provided for by ordinance was demonstrated within the last few years, during which it was necessary for the said city to have recourse to both the surety bonds and the collateral security in cases where the accepted depositaries closed their doors.

If any large amount of the funds of the city of Chicago were to be lost or tied up through the closing of one of its important depositaries, the financial conditions which now prevail and which are hampering the financial institutions of the city of Chicago would make it difficult to so handle the situation that the municipal government could function.

It is therefore of great importance to the said city that this phase of the situation should be presented to this hon-

orable court, in order that it may be considered in connection with the legal questions involved in the above entitled cause.

ARGUMENT.

The City of Chicago is vitally interested in the main question at issue in this case—the question of the right of a national bank to pledge its assets as security for public funds deposited with it.

The case as presented in the court below involved a comparatively small sum belonging to the City of Marion, a city under the commission form of government. The amount on deposit for the City of Marion was $16,430.00. While the loss of this money might be a serious blow to that city, it is not enough to disrupt the municipal government. Any one of hundreds of financial institutions in the State of Illinois could easily restore the disturbed situation by advancing to said city, on legally authorized bonds of the municipality, the full amount of the money lost, and the loss could then be distributed over a period of years through the payment of same by the taxpayers in liquidation of the bonds. That in itself presents the case in a different aspect from what would be presented if a large municipality was involved. But there are other features to be considered.

The Circuit Court of Appeals, in its opinion (64 Fed. (2d) 721, 725), stated that the case hinged on the competition between banks in their eagerness to secure deposits. The court said:

> "The necessity urged is based upon competition among banks in their ever growing desire to obtain

deposits. The employment of such means for that purpose seems to us to be wholly unworthy of, and inconsistent with, the object for which banks are organized, and it is by no means certain from this record that the demand for such procedure is general in its extent, or that it is not actuated by certain depositors rather than by the banks."

If it was simply a question of competition between national and state banks, the city of Chicago would have no great interest at stake. It would be a matter of small concern whether one or another depositary of its funds secured the junior share of its deposits or whether such depositary made a profit or sustained a loss thereon. What it is interested in is the fact that under present conditions, if the decision of the court below becomes the established law of the jurisdiction, the city would be left without any protection or security for its funds.

The two sections of the statute under which the city of Chicago selected its depositaries and deposited its funds up to the present time read as follows (Cahill's 1933 Ill. Rev. Stat., c. 24, par. 287, 288):

"Sec. 5. It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and State banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the city council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the city council prior to the end of each fiscal year. Such awards shall be made to the highest and best responsible bidder or bidders. The city council shall have the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests, and award bids accordingly. No bid shall be awarded to any financial insti-

tution other than a regularly organized State or national bank, and no moneys shall be deposited with any bank or such award be effective until such depositary shall have delivered to the comptroller a bond to the city in such sum and with such sureties as the city council shall approve, conditioned in like manner as other official bonds given by public officials charged with the custody of money. The city council shall have power to pass all necessary ordinances to carry the foregoing provisions into effect and provide rules applicable thereto. The city treasurer shall be discharged from responsibility for all moneys deposited by him pursuant to order or ordinance of the city council with any depositaries who may be so named and qualified, and in fixing the amount of the bond of the city treasurer due regard shall be had by the city council of the effect of any such deposits upon the actual amount of money for which the city treasurer may from time to time be held responsible. When money is once deposited in such depositary or depositaries, no check or draft shall be drawn against such deposit unless accompanied by a warrant attached thereto, drawn in accordance with the provisions of article VII of the act above referred to by its title, a duplicate of said warrant to be retained by the treasurer.

Sec. 6. The city council shall have the power to fix the amount and penalty of the bonds of all city officers and of all municipal employees charged with the custody of money or property. It shall also have the power to require the giving of additional bonds, and to increase or decrease the amount and penalty of the bond of any officer, and to require the giving of a new bond where the security on an original bond has become either insufficient or in any way impaired, upon penalty of removal from office. The power vested in the city council by this section shall be so administered as to protect the interests of the city from danger or financial loss, and shall never be used as a means of removing any person from the civil service of the city without a hearing before the Civil Service Commission, in accordance with law. In any such case the city employee or official whose office is sought to be declared (vacant) by reason of a failure to give a new,

additional or increased bonds, shall have the right to have a hearing before the Civil Service Commission upon the question so involved."

The above was changed in June of the present year by eliminating the provision limiting the depositaries to banks doing business in the city, but the requirement that the depositaries shall be national or state banks remains. Otherwise the two sections remain the same.

Pursuant to the authority given by the statute the city adopted ordinances providing for the selection of depositaries and the making of deposits therein. Among the ordinances so adopted was one that is now known as Section 68 of the Revised Chicago Code of 1931, which reads as follows:

"68. Classification of bonds.) No bond shall be accepted by the Comptroller nor approved by the City Council unless it shall come within one of the two following classifications and none other unless otherwise directed by the City Council:

First. The joint indemnifying bond of the depositary with one or more of the surety companies incorporated or licensed to do business in the State of Illinois and acceptable as surety to the Comptroller.

Second. The joint indemnifying bond of the depositary with one or more individuals as surety thereon, and with collateral security as herein provided which is to be deposited with the bond by either the depositary or by one or more sureties on the bond. Provided, that a bank which can qualify as an active bank may give its joint indemnifying bond with one or more individuals as surety thereon without depositing collateral security therewith. And provided, further, that where a bank that shall qualify as an active bank submits collateral security of the kind provided for herein with its bond it may present its joint indemnifying bond with two or more of its officers or directors as surety thereon and it shall not be necessary for such sureties to make affidavit of the value of their property.

> The collateral security required hereunder shall consist of outstanding unmatured United States Government bonds or other securities issued by the Federal government, bonds of the State of Illinois, or full faith and credit bonds or tax warrants of the City of Chicago or Chicago Board of Education, the total face value of such securities to be deposited as collateral by the personal sureties on any bond of such depositary to be at least equal to the amount of city or school money to be deposited under the award made to such depositary."

Inasmuch as section 5 of the statute quoted above contemplates that a depositary is in effect an officer of the city (it being required to give an official bond the same as other officers), it follows that the provision of the ordinance* with respect to the giving of collateral security has the force of a statute. (The laws relating to the bonds of these depositaries form a part of the official bond of the depositary. *Estate of Ramsay* v. *People,* 197 Ill. 572.)

Accordingly the city officials have relied upon pledges made by depositaries of city funds as one of the means, and as is indicated herein in recent years the only practical means, whereby deposits of such funds may be adequately protected.

In normal times the officers of the city of Chicago had no difficulty in securing as many depositaries as were

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* It is not necessary to set forth the other ordinances governing the naming of depositaries, but they were such that under their terms it was the practice of the city to advertise for bids for interest each year and to award the deposits accordingly.

By similar laws relating to all other municipal governments in the state, including counties, the requirements as to depositaries for public funds and the making of deposits therein were extended to all public authorities in the State of Illinois, so that the practice of selecting national and state banks as official depositaries is now universal throughout the state, and in most cases it is mandatory.

deemed necessary. In some years it had as many as 225 depositaries.

During the years when the money of the city was thus distributed among a large number of depositaries it was in a position to demand ample security from each in the form of indemnifying bonds of accredited surety companies, of which there were 75 or more in the United States, practically all doing business in the State of Illinois. The acceptance of such surety company bonds was predicated in each case on the solvency of such company and a limitation of the risk in accordance with the rules established by the United States Treasury Department, which accepts a surety company on a single risk only to the extent of ten per cent of its capital stock. When the depositaries numbered 225 or any other large number the surety companies were able to qualify on the various bonds. But during the last four years there was a constant shrinking of the number of banks which qualified as city depositaries, with the result that only four city depositaries qualified and were accepted for the current year. It is now no longer possible to secure surety company bonds for these depositaries, because all the surety companies of the country combined, if limited to ten per cent of their capital stock, could not produce a bond of sufficient amount to cover the amounts necessarily deposited in one of the depositaries, to say nothing of the fact that it would be impracticable to get 75 or more surety companies to combine on one bond.

The deposits of the City of Chicago in a single depositary have run as high as $65,000,000.00, and even during the current year, when the city's funds were exceptionally low, there was as much as $18,000,000.00 of its money on deposit at one time in one of its depositaries. Obviously, such large

sums cannot be secured by bonds of surety companies under conditions existing at the present time of which this court will undoubtedly take judicial notice.

It follows that, if this court should decide that national banks cannot pledge their securities for the protection of deposits of public money, the large sums which must be deposited in them by the City of Chicago will be subject to loss in case the depositary closes its doors. What the consequences may be in case of the loss of any considerable sum can only be conjectured. It is practically certain that under present conditions such a loss running into many millions could not be replaced through the flotation of a bond issue, and the municipality would probably be reduced to the necessity of abandoning essential governmental functions in the face of a situation where many thousands of men within its borders are without employment and facing destitution.

We submit that there is nothing in the controlling decisions or statutes compelling a conclusion which results in such disastrous consequences. The only decision of the Supreme Court of Illinois on the question holds that a bank possesses the power to pledge its assets to secure such deposits. (*Ward* v. *Johnson,* 95 Ill. 215.) This court will undoubtedly adhere to the established rule of declaring such decision on the state law as binding on it. (*Truax* v. *Corrigan,* 257 U. S. 312; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346.)

The recent decision of the Supreme Court of Illinois, rendered October 21, 1933, in *People, ex rel. Nelson* v. *West Englewood Trust and Savings Bank* (No. 21850 not yet reported) also deserves mention, although that case involves state funds. In holding that a depositary act requiring the depositary to furnish a bond as security for

state moneys, did not repeal or abrogate the common law right of the state to priority upon the insolvency of the depositary, the court stated:

> "In the present case it seems to us that inasmuch as all authorities agree that the primary purpose of a depositary law is to safeguard the revenues, it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law than to say that it is repugnant to that rule. Repeal of laws by implication is even less favored when they affect the sovereign than when they affect the citizen."

By the same line of reasoning it is clear that the requirement of the "Commission Form of Government" act relied upon by the Circuit Court of Appeals as one of the grounds of its decision "was intended to supplement" rather than abrogate the right of the City Treasurer to demand security, other than a surety bond.

Other statements in that case indicative of the strong public interest in securing the safety of public funds are particularly pertinent:

> "At common law the right of preference extended to every character of debt due the sovereign. The rule was not invoked to give him any personal advantage. It was based upon the higher motive of public policy as being essential to obtain revenues to sustain the government. Conditions in the American States present no different situation. Orderly government cannot be maintained without adequate revenues, and it seems that the right to protect them without dissipation or loss ought to be the undoubted prerogative of the people unless and until it shall have been clearly and intentionally surrendered. It is a wholesome right, which should receive sanction and approbation. * * *
>
> The depositary act of Illinois contains no express waiver of the State's preference right. It contains no provision which is inconsistent with the common law rule, on the contrary, it is ominously silent concerning

repeal. Its provisions for the protection of the public revenues are entirely compatible with the common law rule. No reason appears why this salient rule of protection of the public's interest should be discarded in order to subserve to a greater degree the interests of private individuals."

In conclusion we submit that the decision of the Circuit Court of Appeals is unsound as a matter of general law, and particularly under the law of the State of Illinois. We have attempted primarily to present to this Court certain considerations which directly and seriously affect the public interests involved. These, we believe, were overlooked by the Circuit Court of Appeals in deciding questions vitally affecting the City of Chicago.

Respectfully submitted,

WILLIAM H. SEXTON,
Corporation Counsel,
Attorney for the City of Chicago.

LEON HORNSTEIN,
First Assistant Corporation Counsel,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK & TRUST COMPANY, A CORPORATION; THE FIDELITY & CASUALTY COMPANY OF NEW YORK *et al.*,

Petitioners,

versus

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF LELAND K. NEEVES, AS AMICUS CURIAE.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF OF LELAND K. NEEVES, AMICUS CURIAE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The writer of this brief filed a brief in the court below as *amicus curiae*. He represents the receiver of an Illinois state bank in proceedings pending in the United

States District Court for the Northern District of Illinois, Eastern Division, involving the question as to the right of a bank organized under the General Banking Act of Illinois to pledge assets to secure deposits made by the County Treasurer of Lake County, Illinois. There is no decision of the Supreme Court of Illinois dealing with the question so far as it relates to banks organized under the General Banking Act. The decision of the present case, involving as it may a determination of the Illinois law upon the subject, is therefore of large and far reaching importance.

This case with No. 128 involves the following questions:

(1) Whether a national bank under the provisions of the National Banking Act, apart from the 1930 amendment, has power to pledge its assets to secure deposits, either public or private;

(2) Does the 1930 amendment have the effect of making the local law determinative in the case of a national bank in the case of deposits of public moneys of the state or political subdivision thereof;

(3) Has a bank in Illinois organized under the General Banking Act power to pledge its assets to secure deposits of public moneys.

A procedural question is also involved as to the right of a receiver of a bank to recover the assets thus pledged without payment of the deposit.

STATEMENT OF THE CASE.

The facts of this case are fully set forth in the respective briefs of the petitioners and of the respondent. We stress the following: That the bonds in question, admittedly the property of the bank, were directly pledged as security for the deposits made or to be made by Carroll, as Treasurer of the City of Marion. The surety company here involved was the surety upon the City Treas-

urer's general bond. If the surety is required to pay to the City of Marion the amount of the deposit, it, as surety, would have recourse against the principal debtor, viz. the City Treasurer. In the present controversy, therefore, the pledge is sought to be enforced on behalf of Carroll who is responsible to the City as between it and the City and the claim of the surety company is, therefore, one of exoneration of its own liability as surety. The bonds were placed in the custody of a third party, the Continental Illinois Bank and Trust Company. Respondent as Receiver of the bank now closed is seeking the return of the bank's own property as against the claims of petitioners as alleged lien claimants.

STATUTES INVOLVED.

The relevant federal statutes and the relevant provisions of certain Illinois statutes and of the Illinois constitution are set out in the briefs of the respective parties and will not be repeated.

SUMMARY OF ARGUMENT.

Apart from special statutory authority for the pledging of assets by a national bank to secure deposits, either of public or private funds, the power, if it exists, must be found in the general provisions of the National Banking Act in Section 8 thereof. No distinction is there taken between public and private deposits; nor is the power in any way restricted or subject to limitation. The provisions of Section 45 of the National Banking Act in requiring the giving of security by national banks for deposits of public moneys of the United States and for the due performance of their duties as agents of the United States is of itself a delegation of power to national banks to give the security.

There is no general power in national banks to pledge their assets to secure private deposits. The recent tendency in authority is against the existence of such power.

A national bank has no general power to pledge its assets to secure public deposits. In the case of the United States there is no common law right of lien or even priority. Priority rests upon statute. Priority differs from specific lien in that priority is merely a right to be paid ahead of and to the total exclusion, if necessary, of ordinary creditors and depositors. A priority creditor, however, may be required to prorate with other priority creditors, if necessary. On the other hand, in the case of a lien creditor, the creditor is entitled to the exhaustion of the fund, if necessary, in order that his debt may be paid.

The 1930 amendment was intended to create, and has the legal effect of creating, parity between national and state banks within the same locality as to the giving of security for certain kinds of public deposits. It had the effect either of granting to national banks a power not theretofore existing, *i. e.* to pledge its assets to secure the deposits of a state or political subdivision thereof, provided a state bank within the same locality had such power, or, if the general power to make such a pledge theretofore existed, it limited and restricted such power to those cases where a state bank within the same locality could make such pledge. The form and phraseology of the amendment is indicative of such intention and such effect. Upon appellants' theory that the general power to pledge existed, then so far as any question is concerned as to the power of a national bank to make such a pledge the amendment is wholly surplusage. It could not possibly operate as an extension of the powers of national banks.

To consider the amendment, however, merely as restricting a power theretofore and otherwise existing, the conclusion would have to be that in the case of deposits of a different character, that is, deposits other than those of a state or political subdivision thereof, all of the power of a national bank theretofore and otherwise existing remains in full force. Therefore, national banks would retain the right to pledge their assets to secure private deposits but could not do so in the case of the deposits of the state or political subdivision thereof, unless a state bank within the same locality could make such pledge. No reason is suggested as to why the Congress should make such a distinction. All things considered a holding is seemingly required that the amendment intended to confer upon national banks a power to pledge assets to secure the deposits of a state or political subdivision thereof, provided a state bank within the same locality had such power and that such powers did not theretofore or otherwise exist.

By virtue of the amendment, the Illinois law is controlling. The General Banking Act of Illinois does not permit a pledge of assets to secure deposits. The Illinois statute authorizes the formation of banking associations "for the purpose of discount and deposit * * and doing a general banking business * *". No statute can become effective in Illinois affecting the charter power of banks unless submitted to and approved by popular vote. If the general provisions of the Banking Act authorize the pledging of assets to secure public deposits they equally authorize pledges to secure private deposits. *Ward* v. *Johnson*, 95 Ill. 215, does not involve any question as to general deposits of the kind dealt with in the instant case, nor does it involve the provisions of the General Banking Act. The bank there was operating

under a special charter with special provisions therein as to deposits. The essential question there decided was whether that bank could borrow money and issue "investment certificates" therefor. The most recent case in the Appellate Court of Illinois (certiorari denied by the Supreme Court) recognizes the principle of those cases holding pledges of assets to secure deposits to be invalid in the absence of express statutory authority. The common law right of priority in the sovereign is in Illinois limited to moneys belonging to the state. It does not apply to moneys of a political subdivision thereof. The right of priority in Illinois is not the equivalent of a specific lien.

The policy of a state or of the United States is that declared by the constitution and valid laws thereof, or in the absence thereof, by the courts. The legislature, however, can declare a policy with respect to specified classes of deposits and may provide that public deposits may or must be secured by specific pledges of assets. Failing such statutory declaration of policy, however, it is not within the province of the judiciary to declare a policy limited to public deposits alone. A general policy against permitting the securing of deposits, including both public and private deposits, yields only to such specific declaration of policy as there may be in the case of public deposits. Such a specific declaration of policy, if any, in the case of public deposits, must be found in those specific statutes authorizing or directing such pledges to be made.

The receiver may reclaim the securities pledged, leaving the depositor to his general claim against the receivership or to such other rights or remedies as the particular circumstances permit. The receiver does not stand solely in the shoes of the bank. He is the representa-

tive of the creditors and depositors. Pledges to secure deposits, if invalid, are invalid not merely as *ultra vires* of the bank, but are invalid as against the creditors and depositors generally. Such creditors and depositors, through their representative the receiver, are therefore claiming in their own right and not merely through the bank. The securities pledged are admittedly the property of the bank and should be returned to the receiver for the proper administration thereof, leaving to the proper form the determination of all priority or trust claims. If the City of Marion has any claim against the bank on any elements of fraud or trust, those claims may be asserted in the proper form. Even if such claims existed and should be ultimately sustained, still the present pledge should not be enforced. A right growing out of fraud or some trust relationship is but a priority claim and is not the equivalent of a specific lien.

I.

THERE IS NO GENERAL POWER UNDER THE NATIONAL BANKING ACT PERMITTING A NATIONAL BANK TO PLEDGE ITS ASSETS TO SECURE DEPOSITS.

The essential premise of appellants' case is that Section 8 of the national banking Act confers upon a national bank the power to pledge its assets to secure deposits, the seventh subdivision of which empowers a national bank to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; * * *." No power to pledge assets to secure deposits is given in terms. Such power, if it exists, must therefore be found somewhere in the language above

quoted. In this regard we pass for the moment the effect of Section 45 of the Act.

In considering the effect of Section 8, it is apparent that the related question in No. 128 must be kept in mind for if the power to pledge assets to secure deposits is to be found in Section 8 then, we submit, there can be no distinction made between a pledge to secure the deposit of public funds and a pledge to secure a deposit of private funds. Any distinction to be made between those two kinds of deposits must be found elsewhere in the banking Act or in some other applicable statute.

Peculiarly enough appellants do not apparently question the holdings in *Smith* v. *Baltimore & Ohio Rd. Co.*, (C. C. A. 3) 56 Fed. (2d) 799, affirming 48 Fed. (2d) 861, and *Texas & Pacific Ry. Co.* v. *Pottorff*, (C. C. A. 5) 63 Fed (2d) 1, which latter case is No. 128 in this court, notwithstanding that their argument, based upon the cases cited at page 12 of their brief, would indicate that private and public deposits stand upon the same footing.

Section 45 of the banking Act requires the Secretary of the Treasury to require national banks to give satisfactory security by the deposit of United States Bonds and otherwise for the safe-keeping and prompt payment of public money deposited with them and for the faithful performance of their duties as financial agents of the government. We submit that in the case of national banks where the statute in form is a mandate to the public officer to require a national bank to give security, the statute is also a delegation of power to the bank to give the security required. Even there the statute has reference only to public moneys of the United States (*Coudert, Adm.* v. *United States,* 175 U. S. 178; *Branch* v. *United States,* 100 U. S. 673). Similar statutes dealing with deposits of a *quasi* federal or *quasi* public charac-

ter have, we submit, the same legal effect as amounting to grants of power to national banks to make the required pledge.

The court below in the majority opinion expressed doubt as to whether these statutes were to be regarded as grants of power because of the fact that many of them in terms refer to state books and obviously a federal statute cannot, generally speaking, affect the charter powers of state banks. In its opinion the court below said "Hence we conclude that in enacting those statutes Congress did not intend to create additional power for national banks in the respect mentioned, but incidentally recognized a power which it thought already existed under a former statute". We respectfully suggest, however, that the question is not essentially what Congress may or may not have thought about the matter but is as to the legal effect of a statute which requires the giving of such security. For example, supposing either as a matter of construction or by express wording a national bank is forbidden by the general banking Act to pledge its assets for any kind of deposit. Assume then a statute is subsequently passed in the same form as Section 45 of the Act—would it not follow that as a matter of statutory construction the statute would operate as a delegation of power and would suspend the general prohibition of the statute to the extent of the kind of deposit for which security must be given? We suppose that for most purposes, practically at least, there is no difference between an expressed grant or a grant by implication or a "recognition" of some power otherwise existing or otherwise thought to be existing. In either and all events the power to make the pledge is supplied by the statute.

A.

A NATIONAL BANK HAS NO GENERAL POWER TO PLEDGE ITS ASSETS TO SECURE PRIVATE DEPOSITS.

As we have said, the courts of appeal for the Third and Fifth Circuits agree that national banks may not pledge their assets to secure private deposits. One of the most recent cases in the state courts upon this subject is *State Bank of Commerce* v. *Stone,* 261 N. Y. 175; 184 N. E. 750. There the court pointed out the distinctions between a loan and a deposit and held that the power to pledge assets to secure a private deposit did not exist, and in referring to certain statutes dealing with public deposits the court said that an act of the legislature "was evidently thought necessary even as to public moneys to enable banks to pledge certain securities or undertakings or deposits". The court there adopted and applied to private deposits the same principle under which the courts of Minnesota, Kentucky and North Dakota had condemned pledges to secure public deposits not within the terms of the statutes authorizing such pledges.

While the question of policy involved in these cases was the subject-matter of discussion both in the majority and minority opinions in the court below, we stress the fact that the practice of pledging assets must of necessity be carried on in secrecy to prevent the withdrawal by other depositors of their deposits without like security which is itself sufficient indication of its vicious tendency. (Cf. *Farmers etc. Bank* v. *School Dist.* 174 Minn. 286; 219 N. W. 163)

The 1930 amendment does not deal with private deposits, nor does Section 45 deal with private deposits excepting insofar as the argument is made that Section 45

enjoins a duty upon the Secretary of the Treasury to require the giving of security for certain deposits and that said Section 45 merely "utilizes" in certain cases a power which is otherwise conferred upon the bank through other provisions of the Act.

A comparatively few only of the cases involve private deposits. *Ward* v. *Johnson,* 95 Ill. 215, affirming 2 Ill. App. 261 involved a special charter and did not involve at all a deposit in the sense dealt with in the present case. The General Banking Act of Illinois was in no way involved.

Ahl v. *Rhoads,* 84 Pa. 319, is sometimes cited as an authority supporting the right of a bank generally to pledge its assets to secure deposits, including private deposits. In that case the bank, which had been organized under a special act, transferred to the plaintiff (who was a director of and a depositor in the bank) as collateral security for the deposit a certain mortgage held by the bank. The mortgage was foreclosed by the bank with the plaintiff's consent on condition that the bank would thereafter execute to him a mortgage on the same land after the bank had acquired title. Thereafter the bank executed the mortgage to the plaintiff and the plaintiff agreed that the amount which he had formerly had on deposit should not be subject to check but should be repaid to him one year thereafter. Subsequently the bank failed. The principal question was as to the power of the bank to execute the mortgage without the consent of the holders of a majority of the stock. The opinion treats the transaction as one in which collateral is given to secure an indebtedness in the nature of a loan.

In *Cameron* v. *Christy,* 286 Pa. 405, 133 Atl. 551, the statute authorized trust companies "to receive deposits of money and other personal property and issue their

obligations therefor." The case involved public deposits but the court construed the statute as authorizing the giving of security. Among other things, as appears from the opinion, the parties agreed that the pledging of assets by banks to secure public deposits was a matter of general practice in Pennsylvania.

In *Schumacher* v. *Eastern Bank & Trust Company* (C. C. A. 4) 52 Fed. (2nd) 925, a national bank had procured certain loans from a state bank to secure which certain notes and other securities of the national bank were pledged as security. The amounts so advanced by the state bank were carried on the books as "due from banks" and "due to banks". No deposit account was opened for the state bank, no certificates of deposit were issued and the amounts advanced were not reported by the national bank as deposits. The state bank never at any time attempted to check against the advances, the whole matter, as the court said, being handled by both banks as an indebtedness. The pledges were sustained, and of course properly so if the transactions were loans, as there is no question made but that a bank may borrow money and give security therefor. The court should also bear in mind the somewhat peculiar relationship between banks themselves in making advances to each other, whether in one form or another. Generally, such advances, although in the form of "deposits", are in effect nothing but loans (Cf. *Bank* v. *Lanier,* 11 Wall. 369).

In *Button* v. *Sanguinetti* (Ariz. 1932) 11 Pac. (2nd) 1085, the earlier case of *Williams* v. *Hall,* 30 Ariz. 581, 249 Pac. 755, was limited to a case of loan. It was held that a bank has no general power to pledge assets to secure general deposits and that the power to pledge certain assets to secure public deposits rested upon statute. Referring to those statutes the court said: "This language

does not expressly nor impliedly authorize a bank to give security to depositors of private moneys, and the best-reasoned cases hold that such power is not incidental nor essential to good banking practices".

It is competent, of course, for any state acting within the confines of its own constitution to authorize its own banks to pledge assets to secure deposits of any type or character or to place any limitations or restrictions thereon as it sees fit. In other words, any state has unquestioned power to declare its own policy with respect to banking business conducted within its borders by its own banks. The question is not as to the power of the state to act in that regard but it is a question as to whether the bank has been given the power. In the instant case the record is silent as to any established practice in Illinois of making such pledges and although the briefs suggest that in very recent times public officers without specific statutory authority have exacted security, no claim is made that any such practice has been adopted or has prevailed in the case of private deposits. We are confident that the court will appreciate that the pledging of assets to secure a private deposit is not incidental or reasonably necessary to carry on the business of banking within the legal meaning of the doctrine as to implied powers.

We submit, therefore, that viewed from the standpoint of a private deposit, we must start with the premise that the general power to conduct a banking business and to receive deposits does not by implication carry with it power to pledge assets to secure such deposits.

B.

A NATIONAL BANK HAS NO GENERAL POWER TO PLEDGE ITS ASSETS TO SECURE PUBLIC DEPOSITS.

The same general principles, we submit, apply as to pledging assets to secure public deposits as apply to a pledge to secure private deposits. We cannot understand how Section 8 of the General Banking Act grants power to pledge assets to secure public deposits and at the same time withholds power to make a pledge to secure private deposits. It may of course be desirable that public deposits be placed in a separate category and be secured by specific pledge. The public at large is obviously greatly concerned in the safety of public funds, whether state or national. While in the states generally there is recognized a common law right of priority in payment, except as modified by statute, there is no such right of priority in the case of the United States or any of its public offices. As the opinion of the court below points out and as the unquestioned rule is in the case of the United States and its public offices, priority in payment depends wholly upon statute. It has been suggested that the power to pledge is the equivalent of the common law right of priority. The analogy, however, does not hold. In Illinois, for instance, the right of priority extends only to moneys belonging to the state itself. It does not apply to moneys of any of the political agencies of the state. (*People* v. *Marion Trust & Sav. Bk.*, 347 Ill. 445; *People* v. *West Englewood Trust & Sav. Bk.*, 353 Ill. 451; 187 N. E. 526. However, such right is a right of priority only and not of specific lien. The priority exists only as against general creditors or deposits of the bank, and the priority may be subject to a process of prorating with other priority creditors. A lien claimant on the other hand has a right to

have the fund pledged exhausted for the payment of his claim. As to the assets pledged, the right of the depositor is paramount both to general creditors and depositors and to priority creditors not holding a specific lien. For an analysis and classification of the numerous cases upon the subject of pledging assets to secure public deposits, we refer to the majority opinion below. We shall attempt no review of them in this brief. We ask the court, however, to bear in mind in considering those cases which sustain a pledge to secure public funds merely because there is no express prohibition in the statute against such pledge that such holdings have the effect either of wiping out any distinction between public and private deposits or else are an attempt on the part of the courts to declare a policy as to a specific type of deposit, a matter which is solely within the province of the legislative branch of the government.

The two cases which can perhaps be regarded as forming the basis for those holdings sustaining a pledge to secure public deposits are *Richards* v. *Osceola Bank*, 79 Ia. 707, 45 N. W. 294, and *McFerson* v. *National Surety Co.*, 72 Colo. 482, 212 Pac. 489. Both cases dealt with the question summarily and without the citation of authority. The reasoning in the Colorado case would apply equally to private deposits. The reasoning in the Iowa case would also seem equally applicable to private deposits, or if not, then the court has declared a policy for a single class of deposits, a power which we have said does not belong to the judicial branch of the government. In a later Iowa case, *Andrew* v. *Odebolt Sav. Bank*, 203 Ia. 1335, 214 N. W. 559, the earlier holding was approved and the court inquired as to whether there was any logical reason "why the bank may not legally transfer any portion of its assets in good faith to the county or any other depositor in payment of or as secur-

ity for deposits of public funds?" It was said that the bank might have sold the assets and paid the deposits. The court's reasoning is not convincing and its conclusion is not a necessary consequence of its premise. If the bank sells its assets the depletion in assets is offset by a corresponding decrease in deposit liabilities. If money is borrowed to pay depositors, the liabilities remain the same, which, however, could be said if sufficient were borrowed to pay all of its depositors. In that event the bank would cease to function as a bank of deposit (Cf. *Farmers State Bank of Gatzke* v. *County of Marshall,* 175 Minn. 363, 221 N. W. 243).

We admit that there is or may be a strong urge on the part of any court to protect what seems to be the public interest by sustaining a pledge made without statutory support other than may be found in the general authority to conduct the business of banking and to receive deposits. The history of the last few years may have crystallized this natural tendency. There is, however, implied in a general way, in the business of banking, the question of equality between depositors, subject only to those well-defined exceptions where rights of priority exist either in the case of public deposits or sometimes in the case of private deposits where elements of fraud or of trust intervene. And as has been pointed out, the question does not arise in all its magnitude until the bank has closed its doors. It may be said that any taxpayer has the right to exact security and to refuse to deposit his money in the bank unless such security is given, but if all depositors took that position and acted upon it, it seems to us very apparent that the bank would either have no free assets or it would have no deposits. In neither event could the bank function as a bank.

III.

THE 1930 AMENDMENT GAVE TO A NATIONAL BANK ONLY THE SAME POWER TO PLEDGE ITS ASSETS TO SECURE PUBLIC DEPOSITS OF THE STATE OR SOME POLITICAL SUBDIVISION THEREOF AS A STATE BANK WITHIN THE SAME LOCALITY POSSESSES.

It is not unusual for the Congress, to the extent it may lawfully do so, to create parity between state and national banks within the same locality. Branch banking is but one illustration. National banks acting as trustees within the given state is another illustration. Congress may, therefore, either grant to national banks the same power possessed by state banks within the same locality, or if the power of national banks were otherwise greater than the local banks, Congress could restrict the power of national banks to those exercisable by the local banks. It is argued by appellants and in the minority opinion below that the 1930 amendment was an extension of the powers of national banks rather than any abridgment thereof. To the extent that it conferred upon national banks the power to pledge assets to secure the deposits of the state or some political subdivision thereof, and which power did not theretofore exist, we agree that the 1930 amendment was an enlargement of the powers of national banks and was a delegation of authority to them to make such pledge. If, however, we start with appellants' premise that the power to make such a pledge as is specified in the amendment existed prior to the amendment and wholly apart thereof, then the amendment must operate as a restriction upon the powers of national banks or else the amendatory act was wholly surplusage. We cannot understand how upon appellants' premise the amendment can be regarded as an enlargement of the powers of national banks. The

power asserted by appellants as existing under the general provisions of the Banking Act and by implication therefrom is without limitation of any kind. If any specific asset can be pledged by the bank then all of its assets can be so pledged. The minority opinion suggests that it was intended to do away with any prior inhibitions upon national banks. There is no suggestion made as to what those inhibitions were or might be. A general power to pledge assets without more has no inhibitions and no other enactment is pointed out which would operate as an inhibition upon the power. It is not to be presumed that Congress intended to do an unnecessary thing and nothing in the record submitted with respect to the enactment of that amendment is sufficient to indicate such to be the case. Certainly if nothing more was intended than to merely confirm an existing power, we can see no occasion for that part of the amendment which establishes equality between the national and the state bank within the same locality. If the state bank had the power to pledge its assets to secure the deposits of the state or any of its political subdivisions then Congress intended that a national bank should have the same power and none other. This equality exists under the amendment only with respect to the deposits of the state or its political subdivisions. Under the reasoning of the minority opinion below a national bank can pledge its assets to secure private deposits or any other type of deposit other than those of the state or some political subdivision thereof, wholly without regard to whether a state bank within the same locality could make such pledge. There would be no equality or parity between a national and a state bank within the same locality as to such deposits. We have seen no convincing suggestion as to why the Congress

should establish such equality between a national and a state bank merely as to state deposits.

It has been said upon one or more occasions that the Comptroller of the Currency has consistently ruled apart from the 1930 amendment that a national bank may properly pledge its assets to secure public deposits. We are not advised as to whether such rulings refer only to the deposits of the kind mentioned in the various special statutes, whether they apply to deposits made by a state or some political subdivision thereof without regard to whether a state bank within the same locality may make such pledge, or whether they include deposits of a kind having some resemblance to public deposits such as receivers. Even there, there is no claim that it has been the ruling of the Comptroller that private deposits may be so secured. We respectfully submit, therefore, that the fact, if it be a fact, that such rulings had been made with respect to public deposits generally, adds nothing of force to the question to be determined, but that the question in its entirety should be independently determined.

It is said by petitioners in their Summary of Argument (Br. p. 9) that with the exception of Judge Sparks' opinion in the present case, all other expressions of the Federal Courts as to the effect of this amendment support the petitioners' contention that the amendment did not withdraw from national banks power previously existing. We challenge the accuracy of that statement.

In *Feather* v. *School District,* United States District Court, Western District of Pennsylvania (Petitioners' Br. p. 20), the court based its decision upon the amendment and the further fact that it conceived that the Pennsylvania Supreme Court had sustained such pledges.

In *Pottorff* v. *El Paso-Hudspeth Counties Rd. Dist.*

(C. C. A. 5) 62 Fed. (2d) 498, the decision was rested upon the fact that the Texas statute authorized the pledge. In no other way could the Texas rule have been made controlling other than through the 1930 amendment. The amendment in so far as it deals with powers of national banks is surplusage upon appellants' theory of the case.

IV.

THE GENERAL BANKING ACT OF ILLINOIS DOES NOT PERMIT SUCH PLEDGE.

In considering this question the court must keep in mind—first, the provisions of Section 5 of Article XI of the Illinois Constitution which provides that no statute "authorizing or creating corporations or association with banking powers, whether of issue, deposit or discount, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for, or against such law" and second, the rule of the Illinois Supreme Court upon the subject of implied powers of corporations.

The right of a bank, if any, to pledge its assets to secure deposits depends upon the extent of its charter powers. The argument of appellants is in effect that the right to pledge assets to secure deposits is incidental to, or implied from, the power to conduct the business of banking and to receive deposits. Any statute, therefore, which confers upon Illinois banks the right to pledge its assets to secure deposits is within the constitutional provision and is ineffective unless submitted to and ap-

proved by popular vote. The referendum provision of the statute refers "to the manner of organization of banking corporations, the privileges granted to them, the duties and obligations imposed upon them, the supervision, regulation and control of them by the Auditor, and not to the general rules of commercial law, the law of negotiable instruments, and the great mass of substantive law to which the Banking act makes no reference" (*People* v. *Gould*, 345 Ill. 288, 302-3). Even though a statute is of general application and applies to other corporations, if it in effect deals with the charter powers of a bank or any of its essential functions, it is invalid and inapplicable to banks without a referendum (*Golden* v. *Cervenka*, 278 Ill. 409; *Reed* v. *People*, 125 Ill. 582; *Sykes* v. *People*, 132 Ill. 32.)

The relevancy of the referendum provision of the Illinois constitution is apparent when considered in the light of appellants' argument that a statute may "recognize" a power in a bank to pledge its assets to secure deposits. Such "recognition" is wholly ineffective in Illinois unless the power claimed to be "recognized" is itself found in some statute which has met the test of the referendum. In the case of national banks and so far as concerns the National Banking Act and other federal statutory enactments, the theory of recognition is, we submit, a misnomer. The power claimed must be found either in some statute other than that in which the "recognition" is made or else the statute which recognizes the power is in legal effect a grant of such power.

In connection with the referendum provision appellants question the holding of the court below with respect to the Commission Form of Government Act which provides for the giving of bond by the bank to secure the deposits there mentioned. It is said that that statute can-

not abrogate the power of the bank to make a pledge which otherwise exists under the General Banking Act because not submitted to referendum, and that therefore the Commission Form of Government Act is ineffective to strike down such pledge. We point out, however, in this regard that under proper circumstances a statute can prohibit in particular cases the exercise of an otherwise existing power without abrogating the power itself. A statute we conceive may properly be held to be valid which in terms provides that a bank shall not pledge its assets to secure some particular type of deposit. On the contrary, if the power to pledge assets in general is not found in the General Banking Act then any statute which delegates that power to a bank must be submitted to referendum.

A.

AN ILLINOIS BANK HAS NO IMPLIED POWER TO PLEDGE ITS ASSETS TO SECURE DEPOSITS.

The books are full of cases discussing the nature and extent of the implied powers of a corporation. In Illinois the rule is that corporations can exercise only such powers as are conferred by the legislative body creating them "either in express terms or by necessary implication" and that implied powers are presumed to exist to enable such bodies to carry out the express powers granted and to accomplish the purposes of their creation. (*People* v. *Chicago Gas Trust Co.*, 140 Ill. 268.

In *Calumet, etc. Dock Co.* v. *Conkling*, 273 Ill. 318, the loan of money by a corporation was held void although made as part of a transaction whereby the corporation was endeavoring to sell a portion of its real estate. In that case it was said that an "implied or incidental power

must be directly or immediately appropriate to the execution of the powers expressly granted and not one that has a slight or remote relation to it" and that a "power which the law will imply must be one in a sense necessary or needful and suitable to accomplish the object for which the express powers were granted". Among other cases the court cited *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24.

In Illinois, therefore, a power will not be implied merely because its exercise may be of some benefit or advantage to the corporation. The essential consideration is that the implied power must be one which will enable the corporation to exercise the powers expressly conferred upon it, as it is not to be presumed that the state would authorize the corporation to carry out its objects and at the same time deny to the corporation the necessary to reasonable means of so doing. Nowhere in any discussion that we have seen of the general question now under consideration has it been claimed or thought that the power to pledge its assets to secure any of its deposits, either public or private, was in any way essential to the carrying on of the bank's business of receiving deposits. On the contrary, as the Supreme Court of Minnesota has said (*Farmers etc. Bank* v. *School Dist.*, 174 Minn. 286, 219 N. W. 163), the indulgence in any such practice is conducive to the destruction of the bank. Furthermore, nothing in the record now before this court indicates the necessity of any such power to enable banks to function as banks of deposit.

That a sovereignty may by valid statute declare a public policy of authorizing and empowering banks to pledge assets to secure the funds of the sovereignty, as Congress has done in the case of the National Bank Act, is no indication that the power exists either as to public or

private funds in the absence of such express statutory authority. On the contrary, the existence of such a statutory declaration of policy is strong evidence that without it the power claimed does not exist.

So far as the law of Illinois is concerned, the question is as to whether the General Banking Act confers power upon banks organized thereunder to pledge its assets to secure the payment of deposits either public or private—in the instant case to secure public deposits of a municipality. In this regard we lay to one side for the present the question as to the Commission Form of Government Act. It is argued by appellants—first, that *Ward* v. *Johnson,* 95 Ill. 215, is a decision holding that such pledges may be made, and secondly, that whether or not it does so hold certain of the language in the opinion in effect states that such pledges may be made and that the General Banking Act was enacted in the light of this language, with the result that the General Banking Act is to be construed as conferring such power. It is obvious from a mere cursory reading of the case that it did not involve deposits of the kind involved in the instant case; nor was the General Banking Act there involved. The exact question decided in that case was as stated by the court in the opinion whether the bank had "power to borrow money and issue 'investment certificates' therefor, secured by trust deed as was here done." The bank was organized under a special act of the legislature and the statute empowered the bank "to make such special regulations with reference to trust funds, deposits or savings as shall best aid the depositors and parties interested". There the certificates in question were in fact investment certificates. There was no general obligation on the part of the bank to repay the certificates but there were redeemable either by exchanging them for

specific securities held by the trustee or were redeemable in cash not out of the general funds of the bank but solely out of the proceeds derived from the collection or sales of the securities so pledged. The transaction there dealt with in the event the investment certificates were exchanged for the securities pledged with the trustee, constituted rather a sale of such securities and if they were redeemed in cash out of the proceeds derived from such securities, the transaction constituted in effect a loan. The District Court in this case recognized that the question decided in *Ward* v. *Johnson* differed from that in the case at bar but stated that the broader principle therein expressed had never been questioned in Illinois by any decision or by any legislative enactment. The case, however, so far as the question involved was concerned involved no broad principle and no occasion has arisen to consider that decision from the standpoint of general deposits of the kind involved in the instant case. In one Appellate Court case (*Lamb* v. *Fidelity & Deposit Co.* 257 Ill. App. 262, certiorari denied by the Supreme Court) nothing was involved in the way of a pledge but the case dealt with the rights of a surety company which had become surety upon the County Treasurer's general bond as against certain personal sureties who had agreed to indeminify the surety company against liability. The right or power of a bank to execute a depositary bond to secure a deposit is wholly different from the right or power to pledge assets as security therefor. (Cf. *Farmers etc. Bank* v. *School Dist.* 174 Minn. 286, 219 N. W. 163; *Leonard Co-op. Creamery Assn.* v. *First State Bank*, 168 Minn. 28, 209 N. W. 631.)

In *People* v. *Seward State Bank*, 268 Ill. App. 32, the court in the course of its opinion approved *Commercial Bank & Tr. Co.* v. *Citizens Trust & Guaranty Co.* 153 Ky.

566, 156 S. W. 160, saying with reference to the General Banking Act that it "contemplates fair and uniform dealing by banks with all their depositors and any secret agreement to protect one while others are left without security, even though no actual fraudulent intent is apparent, is nevertheless absolutely void and of no effect." The case involved an alleged trust or special deposit. Certiorari was denied.

As we have stated before, most of the cases are classified and reviewed in the majority opinion below. The recent tendency is in the direction that such pledges are invalid in the absence of some specific statutory authority (*State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750; *Foster* v. *City of Longview* (Tex. Com. App.) 26 S. W. (2d) 1059; *Austin* v. *Lamar County* (Tex. Com. App.) 26 S. W. (2d) 1062).

In the two cases from the Fifth Circuit (*Pottorff* v. *El Paso-Hudspeth Counties Rd. Dist.* (C. C. A. 5) 62 Fed. (2d) 498 and *Texas & Pac. Ry. Co.* v. *Pottorff* (C. C. A. 5) 63 Fed. (2d) 1, the latter case being No. 128 in this court, the court denied any general power in a national bank to pledge its assets to secure deposits but sustained the power to pledge assets to secure deposits of local municipalities on the ground that the Texas statute authorized such pledges and that the Texas statute was made controlling by virtue of the 1930 amendment.

In the cases from the District Court for the Western District of Pennsylvania (Appellant's Br. pp. 20-21) a general power to pledge was denied but as we view it the 1930 amendment was recognized as controlling as to deposits of a local municipality and the local rule in Pennsylvania was applied. The case from the District Court for the District of Connecticut (Appellants' Br. p. 21) in making a distinction between public and private deposits

without the support of statute is but another example of judicial legislation. No court has the right to declare a policy in such fashion. The case from the Tenth Circuit (Appellants' Br. p. 25) also recognizes the controlling effect of the 1930 amendment where it applies in effect the Colorado rule.

Appellants refer to Section 11 of the Illinois Banking Act as amended in 1929 directing that receivers of closed banks shall take security for such deposits. That amendment was submitted to referendum and therefore may validity add to the charter powers of banks. The same principle applies to that provision as applies to Section 45 of the National Banking Act. A direction to the receiver to require such pledge carries with it by necessary implication the necessary implication the necessary power to the bank to make the pledge. This is not, as appellants claim, an expression of the general policy that Illinois banks should have the power to pledge their assets to secure any and all deposits but was an express declaration of policy that banks could and must secure deposits made by receivers of closed banks.

Reference is made to the State Depositary Act, which in terms requires the giving of security for deposits of state money. The Attorney General, however, has ruled that the statute is invalid because not submitted to referendum, also that none of the Illinois statutes authorizes or empowers an Illinois bank to pledge its assets to secure deposits of any kind (Op. Atty. Gen. 1930, p. 457; Op. Atty. Gen. 1931, p. 1).

Appellants cite in their brief some of the decisions in the various states as supporting their contentions. As we have said before, we shall not undertake a review of these cases. Careful reading of them will disclose the grounds on which they are based. Appellants refer to

the cases holding such pledges to be invalid in the absence of requisite statutory authority as expressing the "minority view". A reading of the cases, however, will indicate that most of the cases relied upon by appellants to support their views are in reality based upon some measure of statutory authority. Few if any of them go to the extent of holding that a mere general authority to conduct a banking business or to receive deposits carries with it the authority to pledge assets to secure such pledges. A negligible few involve private deposits at all. As we have said upon the general premise that the general power to conduct a banking business and to receive deposits implies authority to pledge assets to secure such deposits, no distinction can be made between public and private deposits. Therefore, wherever in those jurisdictions a distinction between those two types of deposits is made, a holding in support of a pledge for a public deposit is necessarily either based upon statutory authority or else the court is itself in declaring a policy in that regard, in evading in that regard the province of the legislature.

Appellants refer in their brief, at p. 57, to various state statutes requiring the giving of security. The argument is that these statutes refute any idea that the making of such pledges is contrary to public policy. Appellants, however, seem to overlook the fact that the policy is what the legislature declares it, and no one heretofore has questioned the right of any state by valid enactment to declare a policy with respect to public deposits which does not or might not apply to private deposits. That is the point that we have been endeavoring to make that if such pledges are to be made they must be made under direct statutory authority.

V.

THE RECEIVER IS ENTITLED TO RECLAIM THE SECURITIES.

There is some divergence of view as to whether if a pledge is invalid the securities may be reclaimed by the receiver. In Illinois at least a receiver of a closed bank is a direct representative of the creditors and is not merely standing in the shoes of the bank (*Golden* v. *Cervenka,* 278 Ill. 409). In one aspect of the question, the pledge, if invalid, is invalid not merely as to the bank because in excess of its charter powers, but is invalid as against other creditors and depositors. In that sense the creditors or depositors through their direct representative the receiver have a standing to insist that the securities pledged be returned. They are not necessarily claiming through the bank. The question does not always arise in the same manner as it has arisen in the instant case—for example, in the case in which the writer of this brief is involved, the action was brought by the surety company to compel the application of the securities to the payment of the deposit; in other words, the surety company is in court asking the enforcement of the lien. The receiver is defending against that position. In the instant case the securities are in the possession of a third party and the receiver is attempting to compel their return to him for proper administration. The defendants there are asserting their claim to such securities, the surety company being really in the guise of the principal claimant. It was the surety upon the official bond of the City Treasurer and it is in the position of affirmatively asking for a right of subrogation and the enforcement in the name of the Village Treasurer of the pledge attempted to be made. Appellants finally suggest that if the deposits were made in violation of the

statute, they should be regarded as in the nature of a trust fund. We submit that the record does not permit such an adjudication. No such relief was prayed in the pleadings and all that is required to be done under the judgment of the court below is that the assets in question, admittedly the property of the bank, be returned to the receiver for proper administration. If appellants have any claims against the receiver on the theory that the fund is a trust fund, it may now make proper application therefor. Even there the right is one of priority rather than of specific lien. It is for the receivership court to determine any such question raised by appellants and to determine priorities in orderly fashion.

Two other briefs have been filed as *amici curiae*—one on behalf of the Philippine Islands, and one on behalf of the City of Chicago. Both briefs stress the question of expediency which is involved. We beg to point out that the banking tragedies which have occurred within the past few years have demonstrated an urgent need for a thorough revision of our banking laws generally, both as to substantive matters and as to questions of administration. Expediency, however, is not a substitute for sound principle.

So far as the City of Chicago is concerned, the suggestion seems to be that certain city ordinances authorizing or requiring a pledge of assets is sufficient authority to the bank to make the pledge. Obviously the powers of an Illinois bank depend upon the statute under which it is created, not upon ordinances of the City of Chicago.

We respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

LELAND K. NEEVES.

APPENDIX.

Law Offices of

FERRELL AND HAY

First National Bank Building

Marion, Illinois

November 3, 1933

Mr. Leland K. Neeves
Scott, MacLeish & Falk
134 S. La Salle Street
Chicago, Illinois

Re: City of Marion, Illinois, a municipal corporation, Continental Illinois Bank & Trust Company, a corporation, The Fidelity & Casualty Company of New York, *et al.*, Petitioners, *v.* Ben Sneeden as Receiver of City National Bank of Herrin, Illinois, Respondent. No. 400, Supreme Court of the United States, October Term, A. D. 1933.

DEAR SIR:

We hereby consent to your filing a brief in the above entitled cause as *amicus curiae.*

HOSEA V. FERRELL,
JOHN HAY,
Attorneys for Respondent.

MAYER, MEYER, AUSTRIAN & PLATT
Continental Illinois Bank Building
Chicago

October 21, 1933.

Mr. Leland K. Neeves
Of Scott, MacLeish & Falk
134 South LaSalle Street
Chicago, Illinois

DEAR SIR:

Re: City of Marion *v.* Sneeden (No. 400, October Term, 1933, Supreme Court of the United States

Referring to the request contained in your letter of the 20th inst., we, as counsel for Continental Illinois National Bank and Trust Company, have no objection to your filing a brief as *amicus curiae* in the above entitled cause. As you know we represent no party other than the Bank.

Yours very truly,

MAYER, MEYER, AUSTRIAN & PLATT.

DFR

Law Offices

POPE AND DRIEMEYER
24 North Main Street
East St. Louis, Illinois

October 27, 1933.

Mr. Leland K. Neeves,
Scott, Mac Leish & Falk,
Attorneys at Law,
134 South LaSalle Street,
Chicago, Illinois.

DEAR SIR:

Re: Sneeden *v.* City of Marion.

This will acknowledge your letter of October 26th.

We do appear in this case for all of the defendants except Continental Bank, and we will not interpose any objections if you ask leave of the Supreme Court to file a brief as *amicus curiae.*

Very truly yours,

POPE & DRIEMEYER
By HENRY DRIEMEYER

HFD:RM.

CC to Messrs. Mayer, Meyer, Austrian & Platt.

FILE COPY

FILED
MAR 1 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 400.

CITY OF MARION, ILLINOIS, a Municipal Corporation; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,

Petitioners,

versus

BEN SNEEDEN, as Receiver of the CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

PETITION FOR REHEARING.

RICHARD MAYER,
H. F. DRIEMEYER,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

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CITY OF MARION, ILLINOIS, a Municipal Corporation; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,

Petitioners,

versus

BEN SNEEDEN, as Receiver of the CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now City of Marion, Illinois, a municipal corporation; Continental Illinois Bank and Trust Company, a corporation; The Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of

the City of Marion, Illinois, petitioners in the above-entitled cause, and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

I.

It is respectfully submitted that the Court should have held that whether general power exists in national banks to pledge assets to secure deposits or not, that is, whether the power extends to the case of private deposits or not, the repeated provision made by Congress for requiring exercise of the power when public funds were deposited, the very general assumption on the part of State Legislatures of the existence of the power, and the long-continued and, until this case, unchallenged administration of the National Bank Act by the Comptroller of the Currency, had worked a practical interpretation or construction of the act which had become so well settled that it was no longer open to judicial question; provision for the security of public funds by obtaining pledges of assets from national banks in which such funds are deposited has become and is so essential a part of the economy of management and safekeeping of public funds, that neither the safety of public funds now so protected nor the opportunity of such protection in the future should be disturbed except by positive legislative enactment.

II.

We respectfully submit that the Court has incorrectly determined the question of Illinois law involved. Whether the transaction involved in Ward v. Johnson, 95 Ill. 215, was a loan as distinguished from a deposit or not, the fact remains that the Court in that case clearly and unqualifiedly made the statement that Illinois banks have authority to pledge assets to secure deposits. We submit that if any assumption is to be made, it should be assumed that the statement of the Court in Ward v. Johnson has been regarded in Illinois as expressing the law, rather than to assume that because of the fact that the statement has not been questioned in any subsequent Illinois decision, Illinois banks have not pledged assets to secure public deposits, or, if they have done so, such pledges have uniformly been conceded to be invalid without litigation. As this Court has pointed out, courts of other states have referred to Ward v. Johnson as authority for the proposition that banks have the power to pledge assets to secure deposits (Note 4 to Opinion). No reason suggests to your petitioners itself why Ward v. Johnson should have been regarded otherwise in the State of Illinois; the absence of reported litigation seems persuasive, if not conclusive, that in the liquidation of closed state banks in Illinois public deposits secured by pledge of assets have been uniformly accorded the benefit of the security given therefor. The Court says that "no exertion of the alleged power on the

part of any state bank has been shown." Proof of actual instances of the exercise of the power upon the part of an Illinois state bank could not possible be so conclusive of the existence of the power as is the recognition of its existence and utilization by the Legislature.

In deciding the question of Illinois law relative to the powers of state banks, the Court has also overlooked the question of the legislative interpretation of the Illinois statute relating to the powers of banks. The Court has referred to Section 10 of the State Depositary Act (Opinion, Note 3a), but it has not given consideration to the fact that under Section 5 of Article XI of the Illinois Constitution of 1870, no law affecting the corporate powers of banks may become effective without a referendum, and the fact that no provision was made for submitting the State Depositary Act to referendum. It cannot, therefore, be said that the duty imposed upon the State Treasurer by the State Depositary Act to demand pledges authorizes Illinois state banks to make them. If the decision in this case be adhered to, then the result is that all pledges made by banks in Illinois, whether state or national, to secure deposits of state funds are illegal and void. This result should not be reached. The safety of the public funds of the state should not be imperiled. It seems more reasonable to conclude that the Illinois State Depositary Act is a recognition by the Legislature of the existence of general power in Illinois banks to pledge assets as security for public funds and provision for specific utilization of that

power for the protection of state funds. If the general power in Illinois banks to pledge assets to secure public deposits exists, then, of course, a pledge made to secure any deposit of public funds is valid, whether the officer making the deposit be specifically required by law to demand the pledge or not.

III.

Respondent should not in any event be permitted to recover the bonds pledged without repaying the money deposited, and the Court, in deciding this case, should have followed the rules laid down in cases such as Citizens Central National Bank v. Appleton, 216 U. S. 196, and Logan County National Bank v. Townsend, 139 U. S. 67.

In those cases the transactions question were ultra vires. There was no identifiable **res** or constructive trust based on special circumstances of misconduct, and yet the Court held that it was the duty of the bank to account for the money which it had received as a result of its ultra vires transactions.

The Receiver in this case is seeking to disaffirm a contract of which the bank and its creditors have had the benefit. If the contract was ultra vires the bank might have set it aside, but it could not have recovered the pledged bonds without repaying the deposits; it could not retain the benefit of the disaffirmed contract. The general rule is that a receiver acquires no greater rights in its

property than the bank had.* In this case, if the pledge be held ultra vires, it was void, and general creditors would have no superior right to that of the bank to which the Receiver would succeed. If void, the bank might recover the pledged bonds, but only on condition of returning the benefit it had from the transaction. There is no statute giving general creditors superior rights in a case like this. If the bank prior to receivership did not exercise its right to disaffirm, then the general creditors represented by the Receiver succeed only to such right as the bank itself had, and the Receiver cannot rescind the contract without making restoration to the extent of the benefit the bank had received. The Receiver's prayer is for equitable relief, and relief should be granted only upon equitable principles.

No question is involved in this case of the good faith of the parties. There is no suggestion of fraud or of an excessive pledge or of the solvency of the bank at the time the pledge was made. The money deposited in the

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* See Fourth Street Bank v. Yardley, 166 U. S. 634, where the Court said (page 653): "The Receiver took no greater right in the property of the insolvent bank which came into his possession than that which the insolvent bank possessed." Also, Scott v. Armstrong, 146 U. S. 499, 507: "The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

Section 52 of the National Bank Act (Act of June 3, 1864, Chap. 106, Sec. 52, 13 Stat. 115, and Act of March 3, 1873, Chap. 269, Sec. 2, 17 Stat. 603; R. S., Sec. 5242; 12 U. S. C. A. 91), which provides: "All transfers * * *; all assignments * * *; * * *, made after the commission of an act of insolvency, or in contemplation thereof, made with the view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, * * *, shall be utterly null and void; * * *."

Burrowes v. Nimocks, 35 Fed. (2d) 152, 158-159.

bank was in the possession of Carroll as City Treasurer; he was an insurer of the funds in his hands and he is himself the one who must ultimately pay out of his own funds whatever loss may occur; The Fidelity Company is only the surety on Carroll's bond. It is obvious that the contract of the parties was entered into with the belief upon the part of all concerned that the contract of pledge was valid and lawful. The Comptroller of the Currency had consistently administered the National Bank Act as granting the power exercised; Ward v. Johnson was the single and unquestioned decision of the Illinois courts; the Illinois Legislature had assumed the existence of power not only in state banks, but in national banks, to pledge assets to secure deposits of public funds. The deposits which the bank received by reason of the pledge were applied to the bank's business and the bank and its creditors had and received the benefit of the money due to the agreement which the bank made and the bonds which it delivered as security. To permit the Receiver to recover the bonds pledged and to remit the City of Marion to the status of a general creditor would give the other general creditors of the bank an advantage to which they are not justly entitled. The effect of the pledge of the securities was substantially the same as a sale, and if the Receiver should be permitted to recover the bonds pledged without paying the amount of the City's deposit, the general creditors would, in effect, have the benefit not only of the things sold, but of

the proceeds of the sale. Such a result should not be reached in the absence of a positive statute compelling it.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

RICHARD MAYER,
H. F. DRIEMEYER,
Counsel for Petitioners.

Certificate of Counsel.

We, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

Richard Mayer,
H. F. Driemeyer,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 400.—October Term, 1933.

City of Marion, Illinois, Petitioner, *vs.* Ben Sneeden, Receiver, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 5, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Act of June 25, 1930, c. 604, 46 Stat. 809, amends § 45 of the National Bank Act of 1864[1] by adding thereto the following:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The controlling question is whether Illinois has conferred upon banks organized under its laws power to pledge assets as security for deposits of public moneys of political subdivisions of the State.

In 1931, the City of Marion, Illinois, was operating under the "Commission Form of Government." Cahill's 1931, Rev. Stat. Chap. 24. Par. 323-384. That statute required the treasurer of a city to give a bond; and to

"make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever, to his credit, as treasurer of said city . . . in one or more banks to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city . . . or any two of them, and any such bank before any such deposit is made therein . . . shall also execute a good and sufficient bond with sureties to be approved by the president of said council and conditioned that such bank will safely keep and account for and pay over said money . . ." (Par. 374.)

Carroll having been appointed treasurer of Marion, applied to the Fidelity and Casualty Company of New York to become surety

[1] Act of June 3, 1864, c. 106, § 8, 13 Stat. 101; R. S. 5336; 12 U. S. C. § 24, Seventh.

on his official bond. Although Marion has a population of 9,000, it was then without a bank. The Fidelity Company agreed to become surety on Carroll's bond provided he would get elsewhere a bank which would give satisfactory collateral security for the repayment of his deposits of the public moneys. The City National Bank of Herrin agreed to do this. Thereafter, it delivered to the Continental Illinois National Bank and Trust Company of Chicago, as escrow agent, negotiable bonds of the par value of $23,000, under an agreement so to secure the City's deposit; the Fidelity Company executed Carroll's official bond; and he made his initial deposit in the Herrin bank of the City's moneys. That bank was then solvent. On October 31, 1931, it failed and a receiver was appointed. At the time of the failure the City's deposit was $16,430.00.

Ben Sneeden, the receiver, brought, in the federal court for eastern Illinois, this suit against the City, its treasurer, the surety and the escrow agent. Setting forth the above facts, he prayed that the pledge be declared *ultra vires* and void; that the bonds be delivered to him as receiver; and that, meanwhile, the defendants be enjoined from disposing of them. The District Court dismissed the bill. 58 F. (2d) 341. Its decree was reversed by the Circuit Court of Appeals, one judge dissenting. 64 F. (2d) 721. This Court granted certiorari, 290 U. S. —.

The petitioners contend that the pledge is valid because the Act of 1864, as originally enacted, conferred upon national banks, as a necessary incident of the business of deposit banking, the power to pledge assets to secure deposits; and that the amendment of June 25, 1930, did not limit the power so originally conferred. They contend further that even if the 1930 amendment be construed as denying to a national bank power to make such a pledge unless it is located in a State which grants the power to its state banks, the pledge here challenged is valid, because in Illinois, state banks have the power to pledge assets as security for deposits of public moneys of any political subdivision of the state. The petitioners contend also that even if the pledge was without authority in law, the bill was properly dismissed by the District Court, because the bank could not have required return of the bonds without repaying the deposit and that it would be inequitable to permit the receiver to do so. We think these contentions are unsound.

First. For the reasons stated in *The Texas & Pacific Railway Co.* v. *Pottorff*, No. 128, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under § 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds.[2] A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized. In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained.

Second. Banks organized under the laws of Illinois do not appear to possess the power of pledging assets to secure the deposit of public moneys of a political subdivision of the State. Illinois corporations have only such powers as are conferred by statute either expressly or by implication; and only those powers are conferred by implication which are reasonably necessary to carry out the powers expressly granted, *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268; *Calumet, etc. Dock Co.* v. *Conkling*, 273 Ill. 318. No Illinois statute confers in express terms upon banks organized under its laws either the general power to pledge assets to secure a deposit; or the general power to pledge assets to secure public deposits. A statute confers in terms the power to pledge assets to secure deposits of the States but there is none which so confers the power to pledge assets to secure public deposits of a political subdivision of the State.[3] No reported decision rendered by any

[2]See Texas & Pacific Ry. v. Pottorff, note 11.

[3]In the Banking Act of 1919, Cahill's 1931, Ill. Rev. Stats. Chap. 16a, Par. 1, which, re-enacting the law of 1887, provides for the organization of banks "for the purpose of . . . deposit" there is complete silence on this subject. The only references in any Illinois statute concerning the pledge of assets to secure a deposit are the following:

(a) Section 10 of the State Depositary Act of 1919 (Cahill's 1931 Ill. Rev. Stat. Chap. 130, Par. 29) provides: "No moneys in the State Treasury shall be deposited in any bank approved as a depositary under the terms of

Illinois court since the enactment of the General Banking Law of 1887 holds that the alleged power exists as one incidental to the business of deposit banking. Nor is there any evidence that in Illinois such power is necessary in the conduct of the business of deposit banking.

Ward v. *Johnson,* 95 Ill. 215, 217, decided in 1880, is relied upon as authority for the proposition that Illinois banks have power to pledge assets to secure deposits. That case arose under the charter of "The Merchants, Farmers and Mechanics Savings Bank", which was granted long before the General Banking Act of 1887. The pledge involved therein was given to secure a transaction which appears to have been a loan as distinguished from a deposit. The transaction dealt with private funds. The statement was there made that banks have authority to pledge assets to secure deposits. If that statement expresses the law of the State, Illinois banks have had for more than half a century power to pledge their assets to secure private deposits as well as deposits of public moneys of its political subdivisions. But the case has never been referred to since on this point in any reported opinion of any Illinois court.[4] During that period, many state banks have failed;[5] and there must

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this Act until such bank shall have deposited security with the State Treasurer equal in market value to the amount of moneys deposited.

(b) Section 11 of the Banking Act as amended in 1929 (Cahill's 1931 Ill. Rev. Stat., Chap. 16a, par. 11) provides that a receiver of a closed bank:

"Shall deposit daily all moneys collected by him in any state or national bank selected by the auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safe keeping and prompt payment of the money so deposited."

[4]Courts of other States have referred to it as authority for the proposition that banks have the power to pledge assets to secure deposits. See Williams *v.* Earhart, 34 Ariz. 565; First Amer. Bank, etc. *v.* Palm Beach, 96 Fla. 247; U. S. Fidelity Co. *v.* Bassfield, 148 Miss. 109; Melaven *v.* Hunker, 35 N. M. 408; Page Trust Co. *v.* Rose, 192 N. C. 673; Cameron *v.* Christy, 286 Pa. St. 405; Grigsby *v.* People's Bank, 158 Tenn. 182; Pixton *v.* Perry, 72 Utah 129.

[5]The Auditor of Public Accounts in his annual statement on the condition of state banks (p. 42) gives (Dec. 31, 1932), 1,866 as the aggregate number of the banks existing on Dec. 6, 1888 and organized since. Of these 26 had charters granted prior to Dec. 6, 1888; and 1840 were organized thereafter under the general law. The number of banks in operation Dec. 31, 1932 was 742. The number then in receivership was 444. Between Dec. 31, 1932 and March 1, 1933, 32 more state banks failed. Federal Reserve Bulletin, 1933, pp. 105, 201.

have been much litigation arising therefrom; but no exertion of the alleged power on the part of any state bank has been shown.

An authoritative determination of the question whether Illinois banks have power to pledge assets to secure the deposit of public moneys of a political subdivision of the State can be given only by its highest court. The District Court discussed, but did not decide, that question. Its decision dismissing the bill was rested on the ground that the National Bank Act as enacted in 1864 had conferred the general power to pledge assets to secure deposits; and that the power so granted had not been lessened by the later legislation. The majority of the Circuit Court of Appeals being of opinion that national banks lacked the power to pledge assets to secure deposits (except so far as conferred by the 1930 amendment) necessarily passed upon the applicable Illinois law. After careful consideration, it reached the conclusion that Illinois had not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the State. Its reasons are set forth fully and persuasively; and the decisions of the courts of other States involving similar questions are fully reviewed. We cannot say that the Circuit Court erred in the conclusion reached.

Third. Since the Herrin bank was without power to make the pledge of bonds here in question, its receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank. See *Texas & Pacific Railway Co.* v. *Pottorff*, decided this day.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.